(1)

Supreme Court, U.S.
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No. 03 272 SEP 8 = 2003

In The

Supreme Court of the United States

BILLY RUSSELL CLARK,

Petitioner,

v.

TIM MURPHY, Warden, and
the Attorney General of the State of Arizona,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals erred in its AEDPA analysis by excluding consideration of clearly established Federal law, as determined by this Court, on the issues subject to appeal and whether the decision of the Arizona Court of Appeals in refusing to suppress Petitioner's admissions was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

2. Whether Petitioner's statement "I think I would like to talk to a lawyer" constitutes a clear request for counsel such that his constitutional right to counsel during custodial interrogation as defined in *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981) was violated by the refusal to provide counsel and cease questioning.

3. Whether this Court should clarify its opinion in *Davis v. U.S.* to define a standard by which the invocation of a suspect's right to counsel during custodial interrogation requires only the use of plain, commonly used language.

4. Whether law enforcement officers can obtain a waiver of an effectively invoked right to counsel by continuing to confine the suspect with demands for the suspect to re-think the request for counsel.

5. Whether Petitioner's statements to law enforcement officers were voluntary and whether the State of Arizona can make a showing that Petitioner knowingly, intelligently, and voluntarily waived his rights.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. Essential Facts	2
B. Proceedings Below	6
1. The Arizona Court of Appeals Decision	6
2. The Magistrate Report and Recommendation and District Court Opinion	6
3. The Ninth Circuit Court of Appeals Decision – *Clark I*	7
4. The Ninth Circuit Court of Appeals Decision – *Clark II*	8
REASONS FOR GRANTING THE PETITION	9
I. THE AEDPA MUST BE APPLIED TO REVIEW OF STATE COURT DECISIONS ONLY IN THOSE AREAS WHERE THIS COURT HAS CREATED CLEARLY ESTABLISHED FEDERAL LAW	10
II. PETITIONER'S STATEMENT "I THINK I WOULD LIKE TO TALK TO A LAWYER" IS A CLEAR REQUEST FOR COUNSEL; CONCLUDING OTHERWISE IS CONTRARY TO THIS COURT'S DECISIONS AND IS AN UNREASONABLE APPLICATION OF THIS COURT'S CLEARLY ESTABLISHED LAW	14

TABLE OF CONTENTS – Continued

		Page
III.	THIS COURT SHOULD HOLD THAT THE INVOCATION OF THE RIGHT TO COUNSEL BE ASSESSED BY GIVING THE LANGUAGE USED ITS ORDINARY MEANING..	19
IV.	CLARK CANNOT BE DEEMED TO HAVE WAIVED HIS CONSTITUTIONAL RIGHTS BY LATER SPEAKING WITH DETECTIVES..	23
V.	CLARK'S POST-ARREST STATEMENTS TO POLICE WERE INVOLUNTARY; THERE CAN BE NO SHOWING OF A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF RIGHTS.....	25
CONCLUSION		28

TABLE OF AUTHORITIES

Page

CASES

Alvarez v. Cheely, 36 F.3d 1439 (9th Cir. 1994).....21

Alvarez v. Gomez, 185 F.3d 995 (9th Cir. 1999).....21

Arizona v. Roberson, 486 U.S. 675 (1988) 23, 24

Arnett v. Lewis, 870 F. Supp. 1514 (D. Ariz. 1994).....27

Bell v. Cone, 535 U.S. 685 (2002).....11

Brady v. U.S., 397 U.S. 742 (1970).....26

Cannady v. Dugger, 931 F.2d 752 (11th Cir. 1989).....21

Clark v. Murphy, 331 F.3d 1062 (9th Cir. 2003)..... 1, 8, 11, 16

Clark v. Murphy, 317 F.3d 1038 (9th Cir. 2003)..... 1

Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991) 28

Colorado v. Connelly, 479 U.S. 157 (1986) 26

Connecticut v. Barrett, 479 U.S. 523 (1987) 15

Davis v. United States, 512 U.S. 452 (1994).....*passim*

Desire v. Attorney General of California, 969 F.2d 802 (9th Cir. 1992) 28

Early v. Packer, 537 U.S. 3 (2003).....11

Edwards v. Arizona, 451 U.S. 477 (1981).....14, 24, 28

Escobedo v. Illinois, 378 U.S. 478 (1963).....20, 27

Jones v. State, 742 S.W.2d 398 (Tex.Crim.App. 1987).....21

Lockyer v. Andrade, 123 S.Ct. 1166 (2003).....11, 12

McNeil v. Wisconsin, 501 U.S. 171 (1991) 15

Michigan v. Jackson, 475 U.S. 625 (1986).....15

TABLE OF AUTHORITIES – Continued

Page

Michigan v. Mosely, 423 U.S. 96 (1975).....23

Minnick v. Mississippi, 498 U.S. 146 (1990) 15

Miranda v. Arizona, 384 U.S. 436 (1966).....*passim*

North Carolina v. Butler, 441 U.S. 369 (1979).....15, 26

People v. Cerezo, 635 P.2d 197 (Colo. 1981).....22

People v. Dingle, 174 Cal. App. 3d 21, 219 Cal.Rptr. 707 (Cal. 1985).....22

People v. Traubert, 608 P.2d 342 (Colo. 1980).....22

Rhode Island v. Innis, 446 U.S. 301 (1980).....23

Schiro v. Farley, 510 U.S. 222 (1994).....10

Schneckloth v. Bustamonte, 412 U.S. 218 (1973).....26

Shedelbower v. Estelle, 885 F.2d 570 (9th Cir. 1989).....21

Smith v. Endell, 860 F.2d 1528 (9th Cir. 1988).....21

Smith v. Illinois, 469 U.S. 91 (1984) 13, 15, 21, 24

State v. Eastlack, 180 Ariz. 243, 883 P.2d 999 (1994) ...6, 13

State v. Green, 310 S.E.2d 488 (W. Va. 1983).....22

State v. Hensley, 137 Ariz. 80, 669 P.2d 58 (Ariz. 1983).....22

U.S. v. Gomez, 927 F.2d 1530 (11th Cir. 1991).....28

U.S. v. Perkins, 608 F.2d 1064 (5th Cir. 1979) 21

U.S. v. de la Jara, 973 F.2d 746 (9th Cir. 1992).....21

Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000) 8

Wiggins v. Smith, 123 S.Ct. 2527 (2003).....11

Williams v. Taylor, 529 U.S. 362 (2000) 10, 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d), The Antiterrorism and Effective Death Penalty Act ("AEDPA") 2, 10, 11

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The Webster's Ninth New Collegiate Dictionary (1986) 19

C. Antoinette Clarke, *Say It Loud: Indirect Speech and Racial Equality In the Interrogation*, U. Ark. Little Rock L.J. (1999) 22

PETITION FOR WRIT OF CERTIORARI

Petitioner Billy Russell Clark [hereinafter "Petitioner" or "Clark"] respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. p. 1-23, *infra*,) appealed from is reported at 331 F.3d 1062 [hereinafter "*Clark II*"]. The original opinion of the court of appeals (Appendix "App." p. 24-45, *infra.*) regarding this case is reported at 317 F.3d 1038 [hereinafter "*Clark I*"]. The opinion of the district court (App. p. 46-66, *infra.*) is an unpublished Order. The district court magistrate's Report and Recommendation (App. p. 67-81, *infra.*) is also an unpublished report. The Arizona Court of Appeals' Memorandum Decision is an unpublished decision dated August 31, 1995 (App. p. 82-96, *infra.*)

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment and opinion on June 10, 2003. The Ninth Circuit Court denied a timely petition for rehearing on that date and precluded any rehearing en banc. (App. p. 2, *infra.*). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

When a habeas petitioner's claim has been adjudicated on the merits in a state court proceeding, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d) allows the federal court to provide relief to a petitioner in custody where the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding.

STATEMENT OF THE CASE

A. Essential Facts

On May 24, 1991, at approximately 11:01 a.m., Billy Russell Clark was taken into custody by officers of the Phoenix Police Department, pursuant to a police investigation of a stolen car and the disappearance of his stepmother, Anita Clark. He was transported to police headquarters and was read his *Miranda* warnings by Detective Piano.

The investigation of the stolen car was handled by Detective Masino, who interviewed Mr. Clark between 12:10 p.m. and 12:45 p.m. Later in the afternoon, Detective Masino conferred with Homicide Detective Chambers who was investigating the disappearance of Anita Clark.

Later, Detective Masino continued his interrogation of Mr. Clark, but this time with Detective Chambers present. Detective Masino concluded his investigation and left Detective Chambers alone with Mr. Clark to begin the homicide investigation. At 3:55, Detective Chambers advised Clark of his *Miranda* rights. Detective Chambers did not ask Mr. Clark if he wanted to continue the interview. Detective Chambers did not ask Clark if he was willing to waive his rights and did not obtain any written waiver of rights. Detective Chambers proceeded to discuss with Petitioner the theft of Anita Clark's car; during this conversation, he admitted that he had taken the car and understood it was a theft. At this point, Detective Chambers told Mr. Clark he had some serious problems with his version of events; Billy Clark then made the statement, "**I think I'd like to talk to a lawyer.**"

In response, Detective Chambers told Petitioner the following:

> "I told him if you – if he wanted a lawyer I would call him one. I told him I expected, if in fact he wanted a lawyer and I called him one, our dialogue would be over. I told him that Margaret[1] was there, I wanted to talk with her. That I was going to leave him alone for a few minutes to make a decision, and that when I returned to him I would expect his answer."

Detective Chambers' hope was that Clark would agree to speak with him upon his return to the interrogation room.

---

[1] Billy Clark's sister.

Detective Chambers then left Petitioner alone for a period of between 20 and 30 minutes after which he returned to the interrogation room with the intent of continuing to speak with Petitioner. Upon his return, Detective Chambers did not readvise Petitioner of his *Miranda* rights. According to Detective Chambers, when he returned to the interrogation room, Petitioner said he did not want a lawyer. Upon his return, Detective Chambers spent most of the time talking and no statements of an incriminating nature were made by Mr. Clark during this time period. As the Detective said, "he was trying to minimize to the Defendant what may have actually caused her death. I was trying to rationalize all circumstances, hoping that perhaps I could find a favorable lie, a rationalization that he may accept."

After about 20 or 30 minutes of this type of a dialogue, Billy Clark asked "**should I be telling you or should I talk to a lawyer?**" or "**would it be better for me to talk to a lawyer or to you?**" Instead of asking him whether he wanted a lawyer, Chambers asked Mr. Clark, "Are you asking for my personal opinion or my professional opinion?" Mr. Clark, once again, asked whether he should be talking to a lawyer or to the officer. After a long silence of two minutes or so, the detective responded to Clark.

Using his hands as scales to illustrate his point, Detective Chambers stated that he felt at the time of trial a judge and/or jury would be concerned with remorse, and that remorse should outweigh his fear of punishment. Detective Chambers told Petitioner that remorse would be

a key issue at trial. Shortly after this exchange, Billy Clark made statements implicating himself in the death of Anita Clark.[2]

The interrogation room in which Mr. Clark was questioned measured approximately 6 foot by 8 foot, without any toilet or water facilities. The room contained only a gray table, two chairs, no windows, and a door with a lock.

Mr. Clark was in the interrogation room for nearly an entire day, and into the evening, being interviewed first by Detective Masino and then by Detective Chambers. He had been placed in the interrogation room by detectives for nearly five hours before invoking his right to counsel and without saying anything relative to the disappearance of Anita Clark. Detective Chambers couldn't definitively remember whether Mr. Clark was handcuffed after being left alone after invoking his right to counsel, but vaguely recollects that he, in fact, was handcuffed.

On or about April 17, 1992, the trial court denied Petitioner's Motion To Suppress. (App. p. 97-99, *infra.*). Based upon the trial court's ruling, not only were the statements admitted into evidence at trial, but so was all the physical evidence derived from the defendant's statements. Trial commenced on April 5, 1993 and concluded on April 16, 1993, with a finding of guilty to murder in the second degree, and of theft, a class three felony. On June 5,

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[2] At trial, Billy denied that he had killed Anita Clark.

1993, the trial court imposed the maximum sentence allowed on each offense and ordered that they run consecutively, resulting in a total of thirty years confinement.

B. Proceedings Below

1. The Arizona Court of Appeals Decision

On August 31, 1995, the Arizona Court of Appeals rendered its unpublished Memorandum Decision of Petitioner's conviction and sentence. The Arizona Court of Appeals concluded that the trial judge's determination that "I think I would like to talk to a lawyer" was an equivocal and ambiguous request for counsel, relying on the Arizona Supreme Court's decision in *State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999 (1994). The Arizona Court of Appeals' consideration of *Davis v. United States*, 512 U.S. 452 (1994) was limited to the acknowledgment that there is no requirement to seek clarification in the face of an ambiguous request for counsel. The Arizona Court of Appeals went on to hold that Petitioner's second statement on whether he "should" be talking to a lawyer was also ambiguous and equivocal and that ultimately, Petitioner had waived his rights and his admissions were voluntary. On April 24, 1996, the Arizona Supreme Court declined to accept review of the Arizona Court of Appeals decision.

2. The Magistrate Report and Recommendation and District Court Opinion

On March 19, 1997, Clark filed a timely Petition for Writ of Habeas Corpus.

On January 27, 1998, the Magistrate Judge issued his Report and Recommendation including the following:

> Clark's first request for counsel was unambiguous and unequivocal. There is no way a reasonable police officer could have mistaken his intent. Although the *Davis* Court saw no reason to disturb the conclusion of the lower courts that Davis' remark, "Maybe I should talk to a lawyer" was not a request for counsel, this court is hard-pressed to believe that the high court would be equally sanguineous with Clark's unambiguous statement, "I think I would like to talk to a lawyer."
>
> To hold Clark's request to have been ambiguous *is* to require the suspect "to speak with the discrimination of an Oxford don" and is simply an unreasonable application of federal law as determined by the Supreme Court of the United States.

(App. p. 78-79). The Magistrate concluded, however, that Clark had waived his rights and that his statements were voluntary. The District Court opinion held that Clark's invocation of counsel rights was ambiguous.

3. The Ninth Circuit Court of Appeals Decision – *Clark I*

On January 23, 2003, the Ninth Circuit Court of Appeals filed its first published decision in this case. The court determined that the use of the phrase "I think" in connection with invoking one's right to counsel was "equivocal to some degree," but that it was difficult to determine "how equivocal the statement was." (App. p. 36, *infra.*). The court ultimately concluded that "[w]hile the issue is a close one" that Petitioner's invocation of counsel was ambiguous and equivocal and there was insufficient difference between the phase "maybe I should" – per *Davis* – and "I think I would" to say

that one is not a proper invocation, while the other is. (App. p. 38-39, *infra*.). Because the court found no error in this analysis, the court also concluded that the Arizona Court of Appeals decision was reasonable for purposes of the AEDPA. The court further determined that the manner in which Petitioner was interrogated was proper in that he had been warned of his *Miranda* rights three times and that the conversation over "remorse outweighing fear of punishment" was expressed by the detective merely as an opinion. The court did not comment on what factors constituted Petitioner's "voluntary" waiver of his rights.

4. Ninth Circuit Court of Appeals Decision – *Clark II*

On June 10, 2003, the Ninth Circuit Court of Appeals filed its decision in *Clark II*. The court acknowledged that this Court had recently disapproved of the Ninth Circuit Court of Appeals' methodology for analyzing cases under the AEDPA pursuant to *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000). The court further stated that the *Davis* decision was the "*only* word from the Supreme Court as to whether or not a suspect's statement was an unambiguous request for counsel" and that the Arizona state court's conclusions were not "objectively unreasonable" in light of *Davis*. (App. p. 15, *infra*.). In the new opinion, the Ninth Circuit Court of Appeals refused to express any "'independent' opinion on the merits of the constitutional claim." (App. p. 18, *infra*.).

REASONS FOR GRANTING THE PETITION

This case raises important issues with regard to the application of the AEDPA in habeas review of state court decisions and the level of clarity required for a suspect to invoke and exercise the right to counsel during custodial interrogation. This case provides the Court with the opportunity to define the manner in which state court decisions are reviewed pursuant to the AEDPA. This case gives the Court an opportunity to rectify a grave misinterpretation and misapplication of its authorities. This case also provides the Court with the opportunity to further clarify its decision in *Davis v. United States*, 512 U.S. 452 (1994) insofar as defining the level of clarity necessary for a suspect in custody to invoke the right to counsel. Indeed, this Court's decision in *Davis*, was interpreted by the Ninth Circuit in such a way as to give inconsistent guidance to law enforcement and suspects alike by stating that the suspect, on one hand, need not request counsel with the "discrimination of an Oxford don," while, on the other hand, suggesting that law enforcement may ignore a request for counsel in the face of *any* perceived or arguable ambiguity. This Court has stated that a suspect need not invoke the right to counsel with the "discrimination of an Oxford don;" yet the Ninth Circuit and Arizona courts have required that Petitioner do just that.

With thousands of law enforcement interrogations undoubtedly occurring daily in our Nation, and with many differing invocations of the right to counsel being stated by persons of varying national origins, races, genders, and ages, there is a need for clear, definitive, and understandable guidance on the assessment of a custodial request for counsel. Without further review by this Court, the result of the Ninth Circuit's decision is that suspects will be required to

use absolutely precise language to obtain their constitutional right to counsel.

I. THE AEDPA MUST BE APPLIED TO REVIEW OF STATE COURT DECISIONS ONLY IN THOSE AREAS WHERE THIS COURT HAS CREATED CLEARLY ESTABLISHED FEDERAL LAW.

On April 24, 1996, Congress enacted the AEDPA, which substantially changed federal habeas corpus jurisprudence. *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Prior to the AEDPA, federal courts deciding a habeas petition reviewed state court determinations of federal law under a strictly *de novo* standard. *See, e.g., Schiro v. Farley*, 510 U.S. 222, 232 (1994). Because this case was brought after passage of the AEDPA the question the Court must first address is whether the decision of the Arizona Appeals Court was contrary to, or involved an unreasonable application of, clearly established Federal Law as determined by this Court. 28 U.S.C. § 2254(d)(1). That determination must begin with an analysis of whether the Arizona Court of Appeals, or the Ninth Circuit Court of Appeals, applied or recognized the applicable clearly established Federal Law. As will be shown, the decisions of these courts were in error because they failed to identify the long-standing body of Federal law, as defined by this Court, that merit relief for Petitioner Clark, and applied the facts of Petitioner's case in an objectively unreasonable manner.

In *Williams v. Taylor*, 529 U.S. 362, 404 (2000), this Court made it clear that the "contrary to" and "unreasonable application" clauses have distinct meanings. Addressing the "contrary to" language, the Court held that state

court decision will be "contrary to" clearly established Supreme Court precedent if the state court identifies a rule contrary to Supreme Court law, or by confronting identical facts as a prior Supreme Court case, reaches a different conclusion. *Id.* at pages 404-5. This Court has also made it clear "that the 'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from this Court's decision but unreasonably applies that principle to the facts of petitioner's case." *Wiggins v. Smith*, 123 S.Ct. 2527, 2534 (2003), *citing Williams v. Taylor*, 529 U.S. 362, 413 (2000) and *Bell v. Cone*, 535 U.S. 685, 694 (2002). "In other words, a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'" *Wiggins*, *supra.*, *citing Lockyer v. Andrade*, 123 S.Ct. 1166, 1175 (2003). Although, the state court decision need not actually cite the Supreme Court precedent "neither the reasoning nor the result of the state-court decision" may contradict the applicable Supreme Court standards. *Early v. Packer*, 537 U.S. 3, 6 (2003).

In *Lockyer v. Andrade*, 123 S.Ct. 1166, 1173 (2003), the Court held that where it had not created a "clear or consistent" path on a particular issue, that the reviewing courts must look, for purposes of the AEDPA's application, only to that law that truly is clearly established.

In *Clark II*, the Ninth Circuit Court of Appeals erred in declaring that "*Davis* is the *only* word from the Supreme Court as to whether or not a suspect's statement was an unambiguous request for counsel. . . ." (App. p. 15, *infra.*). First, *Davis*, as will be discussed below, is not the

only word from this Court regarding the level of clarity required for an invocation of counsel, or the manner in which an invocation of counsel should be judged. Indeed, the Supreme Court law that precedes *Davis* provides clearer, and more definitive guidance than the *Davis* opinion does and should have been the law applied in the AEDPA analysis. *See Lockyer v. Andrade, supra*. Second, the Arizona Court of Appeals did not apply either the standard enunciated in *Davis*, or any other recognized U.S. Supreme Court standard, in determining the sufficiency of Clark's specific request for counsel. (App. p. 87, *infra*). Accordingly, it was equally erroneous for the Ninth Circuit to conclude that the Arizona Court of Appeals decision was not an unreasonable application of Federal law. (App., p. 15, *infra.*).

This Court has created clearly established Federal law regarding the standards for analyzing the invocation of counsel rights that were ignored by the deciding state courts, and the Ninth Circuit Court of Appeals in connection with its AEDPA analysis. The state court is entitled to the deferential standard of review under the AEDPA only in those areas where Federal law, as developed by this Court, has been clearly established. The state court's decision, reasoning, or rationale is not subject to any deferential review unless and until the state court has first identified and applied that clear Federal law to the issue at hand. In this case, it had not.

Indeed, unless the AEDPA's deferential review of state court decisions is invoked only where clearly established Federal law is actually followed, considered, or in some way applied, then the AEDPA becomes a license for state courts to violate important federal constitutional rights, without meaningful federal court review. This case is a

good example. The Arizona Court of Appeals did not rely on clearly established Federal law, as defined by this Court, in concluding that Clark's statements were equivocal. Rather, the state appellate court refused to disturb the trial judge unless there was "clear and manifest error," (App., p. 85, *infra.*). Additionally, the Arizona Court of Appeals based its evaluation of Clark's invocation of counsel, not on this Court's precedent, but on the Arizona State Supreme Court decision in *State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999 (1994). An analysis of the *Eastlack* case is important because it is the bulwark of the Arizona Court of Appeals decision in this matter. Although the *Eastlack* court cited to *Davis,* the *Eastlack* court's ultimate conclusions are based on the erroneous premise that this Court had ruled that "if . . . *anything* about the request or the circumstances leading up to it would render the request ambiguous, *see Smith*, 469 U.S. at 97-98, 105 S.Ct. at 494, the interrogator may continue questioning the suspect on any subject." 180 Ariz. at 250, 883 P.2d at 1006. (emphasis added). The problem with the *Eastlack* reasoning is that this Court, in *Smith v. Illinois*, 469 U.S. 91 (1984), never held that *anything* that is arguably equivocal actually renders the request equivocal. Indeed, that rationale is contrary to *Davis*, and this Court's prior holdings. The *Eastlack* court also capriciously concluded that the mere use of the words "I think" was *per se* an equivocation.

By failing to follow a proper analysis under the AEDPA, the Ninth Circuit Court of Appeals has allowed a constitutional violation to "fall through the cracks" on no greater basis than a federal court deferring to a state appellate court, in turn deferring to a state trial court,

where none of the courts correctly applied this Court's authority.

II. PETITIONER'S STATEMENT "I THINK I WOULD LIKE TO TALK TO A LAWYER" IS A CLEAR REQUEST FOR COUNSEL; CONCLUDING OTHERWISE IS CONTRARY TO THIS COURT'S DECISIONS AND IS AN UNREASONABLE APPLICATION OF THIS COURT'S CLEARLY ESTABLISHED LAW.

As of the time of both the state trial court decision and the state appellate court decision, the clearer statements of Federal law, as related to the invocation of counsel, actually preceded the *Davis* decision.

In *Miranda v. Arizona,* 384 U.S. 436 (1966), the Court devised a set of procedural safeguards to be followed by law enforcement officers, which inform a suspect of his constitutional rights, including the right to the presence of an attorney during custodial interrogation. The Court clearly stated that questioning of a suspect must cease if that suspect "indicates *in any manner and at any stage* of the process that he wishes to consult an attorney before speaking." *Id.* at 444-5. (emphasis added). The Court further held that answering questions or volunteering statements does not deprive the suspect of the ability to subsequently invoke his or her rights, and cease questioning. *Id.* at 445.

In 1981, the Court extended the protections afforded by *Miranda* in *Edwards v. Arizona*, 451 U.S. 477 (1981). An accused in custody, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has

been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-5. *Edwards* "sets forth a 'bright-line' rule that all questioning must cease after an accused requests counsel." *Smith v. Illinois*, 469 U.S. at 98. Indeed, where the accused invokes his right to counsel, the courts may admit any further response only upon finding that the accused (1) initiated further discussions with the police and (b) knowingly and intelligently waived the right he had invoked. *Smith,* 469 U.S. at 95. This Court further held that a valid waiver of the suspect's rights "cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation, even if he has been advised of his rights." *North Carolina v. Butler*, 441 U.S. 369, 376 (1979); *see also Minnick v. Mississippi*, 498 U.S. 146 (1990).

Prior to *Davis*, this Court's decisions – in addition to *Miranda* itself – gave broad interpretation to a suspect's invocation of the right to counsel. In *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991) the Court held that invoking one's right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." The Court's language is broad on its face and leaves the interrogating officer with an understanding that a wide range of comments effectively invoke the right. In *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) the Court also concluded that the invocation must be given a broad, not narrow, interpretation "where the defendant's words, understood as ordinary people would understand them, are ambiguous." *See also Michigan v. Jackson*, 475 U.S. 625, 633 (1986).

This was the clear Federal law, as established by this Court, when the Arizona Court of Appeals decided that the statement "I think I would like to talk to a lawyer" was an equivocal ambiguity. Of course, such a conclusion is contrary to U.S. Supreme Court law because Clark, by making such an invocation, voiced a statement that (1) requested counsel in some manner, and (2) given a broad interpretation, would be understood by ordinary people to be a request for counsel. Clark did not ask a question, nor did he use "mights," "maybes," or "perhapses." For the same reasons that the Arizona court's decision is contrary to clearly established law, it also represents an unreasonable application of clearly established Federal law. Neither the Arizona Court of Appeals, or the Ninth Circuit Court of Appeals applied any analysis to Mr. Clark's statements under these U.S. Supreme Court authorities.

In *Clark II*, the court focused on *Davis* alone in analyzing Clark's invocation. Although this Court's decision in *Davis* has been misinterpreted to leave some question open regarding the assessment of an assertion of counsel, no reasonable reading of the decision could lead to the conclusion that mere colloquialisms in speech should result in a finding of ambiguity or equivocation:

> The applicability of the 'rigid' prophylactic rule" of *Edwards* requires courts to "determine whether the accused *actually invoked* his right to counsel." [citation omitted]. To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. [citation committed]. Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." [citation omitted]. But if a suspect makes

> a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require cessation of questioning. [citation omitted].
>
> Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion or it is not." [citation omitted]. Although a suspect need not "speak with the discrimination of an Oxford don," *post*, at 2364 (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require the officers stop questioning the suspect.

Davis, 512 U.S. at page 458-9.

Indeed, in *Davis* itself, when the defendant told the police, "I think I want a lawyer before I say anything else," questioning ceased immediately. While the court was not called upon in *Davis* to consider whether these words were an equivocal request for counsel, the "reasonable" officers subject of the *Davis* opinion believed them clear enough to cease interrogation.

The reasonable interpretation of *Davis* is that the Court does not require absolute precision, that words reasonably construed as a request should be treated as one, and that the Court has, at least tacitly, accepted that "I think" I want a lawyer is an acceptable method of requesting one. Indeed, in *Davis* itself the "I think" language is viewed to express affirmative statements of law.

"The point is whether our continuing refusal to consider §3501 is consistent with the Third Branch's obligation to decide according to the law. *I think* it is not." *see e.g. Davis v. U.S.*, 512 U.S. at 465 (SCALIA, concurring) (emphasis added). In Petitioner's trial, the use of "I think" was regularly deemed effective communication among the lawyers, judge, and witnesses. Detective Chambers used the "I think" language some 20 times throughout his testimony. Defense counsel and prosecutor, without challenge by the court, repeatedly made affirmative statements in argument prefaced with "I think." Petitioner, however, uniquely suffers unusual scrutiny for use of the same language.

Moreover, both the Arizona Court of Appeals and the Ninth Circuit Court of Appeals have unreasonably applied *Davis* for the proposition that *any conceivable or arguable* ambiguous interpretation is sufficient for law enforcement to ignore the request for constitutional protection. Rather than subscribing to the holding in *Davis*, the Arizona Court of Appeals and Ninth Circuit have come to a conclusion by which the invocation of this important constitutional right, which must be invoked by a citizen through the use of speech, is reserved only for those in society that do speak with the "discrimination of an Oxford don." The decision of the Arizona Court of Appeals elevates the invocation of counsel to a level of vocal articulation that few in society possess, much less the suspect confined to an interrogation room. Neither *Davis,* or any other precedent of this Court, has required such eloquence in order to invoke a constitutional right.

The fact is, the words "I think" are not, as used by most people, in most real world situations, all that ambiguous. Certainly, there are dictionary definitions that

render "think" quite concrete in describing state of mind. "Think. To believe, to consider, to conclude, to esteem; to recollect or call to mind." Black's Law Dictionary, Fifth Edition (1979). The Webster's Ninth New Collegiate Dictionary (1986) defines "think" in multiple ways, including "to form or have in the mind," "to have as an intention," "to call to mind," and "to have an expectation."

Under normal definitions, the phrase "I think I would like to talk to a lawyer," is no different than saying "What is on my mind is that I would like to talk to a lawyer." "I think I would like a glass of water" will get you one at a restaurant. "I think I'd like two tickets to that movie" will get you the tickets. There should be no-difference in receiving one's constitutional rights in response to the same level of request.

III. THIS COURT SHOULD HOLD THAT THE INVOCATION OF THE RIGHT TO COUNSEL BE ASSESSED BY GIVING THE LANGUAGE USED ITS ORDINARY MEANING.

Nearly four decades ago, the Court declared that when a suspect subjected to custodial interrogation "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda,* 384 U.S. at 444-45 (1966). The *Miranda* Court further made clear the constitutional effect on the suspect when, upon a stated request for counsel, counsel is nevertheless denied:

> The denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege – to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel, in all cases before us

> today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

Id. at 466, *citing Escobedo v. Illinois*, 378 U.S. 478, 503, 514 (1963).

In addressing the Court's primary issue of whether ambiguous requests require clarification, however, the *Davis* Court also held that "[i]nvocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" 512 U.S. at 459. The *Davis* Court stated a standard for such invocation:

> Although a suspect need not 'speak with the discrimination of an Oxford don,' [citation omitted], he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."

Id.

Unfortunately, the manner in which an "Oxford don" speaks is much more meaningful to lawyers and judges than to suspects and police. Moreover, by adopting a "threshold of clarity" standard in its opinion, the *Davis* Court has been misinterpreted to suggest that any perceived, or even arguable, ambiguity of the "objective" interrogating officer allows the interrogator to simply ignore the request and proceed as if no right was invoked, or suggested, at all. Both law enforcement and custodial suspects alike need to know which it is: In order to invoke

my right to counsel do I have to speak as an "Oxford don," avoiding any ambiguity whatsoever? Or, will I get an attorney if I make some statement reasonably construed as a request for assistance of counsel, using plain, ordinary language?

Indeed in the wake of the Ninth Circuit and Arizona Court of Appeals decisions, suspects are required to "speak with the discrimination of an Oxford don" to effectively request counsel. This runs counter to a vast body of federal and state authority where the "I think" language, or lesser invocations, were deemed effective requests for counsel. *See Smith v. Illinois*, 469 U.S. 91, 97 (1984) ("Uh, yeah, I'd like to do that" a clear invocation); *see also Alvarez v. Gomez*, 185 F.3d 995, 997 (9th Cir. 1999) ("can I get an attorney right now, man?;" "you can have [an] attorney right now?" "well, like right now you got one?" – together sufficient to invoke right to counsel) *citing Davis*, 512 U.S. 452, 458-9; *Alvarez v. Cheely*, 36 F.3d 1439, 1448 (9th Cir. 1994) ("my attorney does not want me to talk to you" coupled with refusal to sign waiver form properly invoked right to counsel); *U.S. v. de la Jara*, 973 F.2d 746 (9th Cir. 1992) ("can I call my attorney" or "I should call my lawyer" a clear invocation); *Shedelbower v. Estelle*, 885 F.2d 570, 571-3 (9th Cir. 1989) ("you know, I'm scared now, I think I should call an attorney" a clear invocation of counsel); *Smith v. Endell*, 860 F.2d 1528, 1529-31 (9th Cir. 1988) ("can I talk to a lawyer" a clear invocation of counsel); *Cannady v. Dugger*, 931 F.2d 752, 755 (11th Cir. 1989) ("I think I should call my lawyer" deemed an unequivocal request for counsel); *U.S. v. Perkins*, 608 F.2d 1064 (5th Cir. 1979) (acknowledging no dispute that "I think I want to talk to a lawyer" an unequivocal request for counsel); *see Jones v. State*, 742 S.W.2d 398, 405-6 (Tex.Crim.App.

1987) ("I think I want a lawyer" held unequivocal); *People v. Dingle*, 174 Cal. App. 3d 21, 219 Cal.Rptr. 707 (Cal. 1985); *State v. Hensley*, 137 Ariz. 80, 669 P.2d 58 (Ariz. 1983) ("I think right now we better stop and let me talk to a lawyer cause I don't know anything about" held unequivocal); *State v. Green*, 310 S.E.2d 488 (W. Va. 1983); *People v. Cerezo*, 635 P.2d 197 (Colo. 1981) ("I think I better have a lawyer" held unequivocal); *People v. Traubert*, 608 P.2d 342 (Colo. 1980) ("I think I need to see an attorney" held unequivocal).

In *Miranda, supra.,* this Court adopted a prophylactic rule that served to protect those subjected to custodial interrogation by informing them of their rights. Now, the Arizona Court of Appeals, in contravention of Supreme Court authority, and the Ninth Circuit Court of Appeals under the guise of the AEDPA, have created a situation that, when informed of the right, it can only be exercised by a verbal request of absolute precision. We have come full circle. We have created laws that inform citizens of their rights, and then we have created new legal principles that make it difficult, and for some suspects – based on their race, gender, national origin, linguistic skills, or intelligence – impossible to exercise those same rights. *See* C. Antoinette Clarke, *Say It Loud: Indirect Speech and Racial Equality In the Interrogation* U. Ark. Little Rock L.J. (1999). Indeed, for *Miranda* to have the same effect it once did, the rights warning should be revised to say that, "if you want to exercise your right to counsel, you are required to say the following: 'I want a lawyer, period.'" While this suggestion may be somewhat "tongue-in-cheek," Petitioner's situation does not make it so far-fetched.

Petitioner urges this Court to clarify *Davis* and define a standard for the invocation of counsel that does not

require the suspect to speak with a higher level of clarity than is required in plain, everyday language utilized in the normal course of societal interactions to obtain something desired. To put in place any higher standard would ensure only that constitutional protections are in place for those few who can, or are savvy enough to, speak with unusual precision in difficult circumstances.

IV. CLARK CANNOT BE DEEMED TO HAVE WAIVED HIS CONSTITUTIONAL RIGHTS BY LATER SPEAKING WITH DETECTIVES.

"[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at page 154. "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 301, 304-5 (1980).

"If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Arizona v. Roberson*, 486 U.S. 675, 681 (1988). The admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was "scrupulously honored." *See Michigan v. Mosely*, 423

U.S. 96 (1975). "No authority and no logic permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all." *Smith v. Illinois*, 469 U.S. at 99.

"[I]f a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect . . . [A] later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Arizona v. Roberson*, *supra.*, at page 682.

In this matter, there is no question that after Petitioner made an objectively reasonable request for counsel that Detective Chambers made absolutely no effort to secure Mr. Clark counsel or to even tell Mr. Clark that counsel would be provided at some point in the future. After Petitioner invoked his right to counsel, Detective Chambers did not provide an attorney, but rather, told Mr. Clark that he, Chambers, was going to interview a witness in the case and that Mr. Clark was required to re-think or re-evaluate his position and to provide the detective with a "decision" upon the detective's return. When Detective Chambers returned to the interrogation room, Clark was merely responding to Detective Chambers' last request for a "decision;" a request that Detective Chambers, under the bright-line *Edwards* rule, was not permitted to make.

Once Clark invoked his right to counsel, Detective Chambers was not free to leave Clark in confinement, whether it be for one time, five times, twenty times, or more, in order to determine whether he could get Clark to change his mind about wanting a lawyer. Again, any finding of waiver would be contrary to this Court's authorities and an unreasonable application of those same authorities.

V. CLARK'S POST-ARREST STATEMENTS TO POLICE WERE INVOLUNTARY; THERE CAN BE NO SHOWING OF A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF RIGHTS.

In this case, Petitioner was kept in a 6 foot by 8 foot, locked, interrogation room for five hours before ever invoking his right to counsel. After invoking his right to counsel, law enforcement not only failed to provide him an attorney, but left him in this small, locked room, informing him that they were going to speak to another witness and that if he wanted a lawyer then the "dialogue" would be over, and that they expected a "decision," when they returned. Petitioner was left alone for another 20 to 30 minutes.

When law enforcement returned, Petitioner still made no incriminating statements despite interrogation. After 20 to 30 minutes more of interrogation, Petitioner stated "should I be telling you or should I talk to a lawyer?" At that time, the interrogating officer told Petitioner that the judge and jury would be concerned with remorse, and that remorse should outweigh fear of punishment.

Petitioner's total time in confinement: about 8 hours.

In essence, the questioning detectives made several things clear to Petitioner: (1) you will not be provided an attorney, even if you ask for one; (2) you will not leave this room until you confess; and (3) if you confess, you will receive more lenient treatment from the judge and jury.

The voluntariness of an accused's statements must be viewed under the totality of the circumstances. *Davis v. U.S.*, *supra*; *Colorado v. Connelly*, 479 U.S. 157 (1986); *North Carolina v. Butler*, 441 U.S. 369 (1979). To determine voluntariness of a confession, a court must look at the totality of the circumstances surrounding the confession and decide whether the will of the defendant has been overborne. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Moreover, the confession may not be obtained by an implied promise. *Brady v. U.S.*, 397 U.S. 742, 753 (1970).

In this case, any one item may not be dispositive in determining whether the will of Petitioner was overborne, except, perhaps the nonchalant manner in which detectives responded to Petitioner's requests for counsel and the implied promise of benefit. However, taken in their totality, Petitioner cannot be said to have made statements that were voluntary in nature. As to the implied promise of benefit, the actions of Chambers were not so innocent as analyzed by the Ninth Circuit or state courts. Detective Chambers was a justice system insider in the eyes of Petitioner. What Detective Chambers' comments told Mr. Clark was not mystery; that if he confessed, he would receive lenient treatment from the judge and jury. It is interesting to note that Petitioner made his statements only after this implied promise was delivered. The Ninth Circuit and state court's approach seemed one of "picking

apart" each aspect of the interrogation as being inconsequential rather that doing what the law mandates, looking at the "totality" of the interrogation, from start to finish.

The length of time that Petitioner was being interrogated is also crucial; over five hours before incriminating himself in Ms. Clark's death. The fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that an accused did not voluntarily waive his rights. *See Arnett v. Lewis*, 870 F.Supp. 1514 (D. Ariz. 1994). The fact that Petitioner's incarceration was for over 5 hours in a 6 by 8 foot locked, windowless room with no toilet or water facilities provides ample evidence that the statements given were involuntary. Moreover, in this case, not only did Petitioner make two requests for counsel, that both went unhonored, but Petitioner never expressly waived his rights, verbally or in writing.

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. This Court has always set high standards of proof for the waiver of constitutional rights.

Miranda, 384 U.S. at page 475, *citing Escobedo*, 378 U.S. 478, 490, n. 14. "[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id.*

The statement, "I think I would like to talk to a lawyer" cannot be construed as a waiver of one's Fifth

Amendment rights. Giving Clark time in isolation to consider his request for counsel cannot be an effective waiver. When Clark asked the interrogating detective whether he should be talking to an attorney, Clark was not engaging in the intelligent and knowing waiver of his rights. Nor, did the interrogating officer's "opinion" that remorse should outweigh fear of punishment, without readvising Clark of his *Miranda* rights, provide Clark any meaningful basis upon which to knowingly and intelligently waive his rights.

The Ninth Circuit decisions in *Desire v. Attorney General of California*, 969 F.2d 802 (9th Cir. 1992), and *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) make clear that no intelligent and voluntary waiver can be found under facts similar to those in this case and that *Edwards* applies to mandate the cessation of all further police-initiated interrogation. *See also U.S. v. Gomez*, 927 F.2d 1530 (11th Cir. 1991).

Under the totality of the circumstances, it cannot legitimately be said that Petitioner's statements were made knowingly, intelligently, and voluntarily. Moreover, the Arizona Court of Appeals erred by not considering the failure of the State of Arizona to prove knowing, intelligent, and voluntary waiver under the totality of the facts and under the operative law of this Court.

CONCLUSION

Based on the above, the Court should accept the writ of certiorari in light of the errors in the Ninth Circuit's decision which have misapplied the AEDPA and the errors in both the Arizona Court of Appeals and Ninth Circuit

decisions that are contrary to and unreasonably apply this Court's legal principles in the area of invoking one's right to counsel during custodial interrogation.

Respectfully submitted,

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331 F.3d 1062

United States Court of Appeals,
Ninth Circuit.

Billy Russell **CLARK**, Petitioner-Appellant,
v.
Tim MURPHY, Respondent-Appellee.

No. 00-16727.

Argued and Submitted Nov. 5, 2002.
Filed June 10, 2003.

James M. Jellison argued the cause for the appellant. Anders Rosenquist, Jr., Rosenquist & Associates, Phoenix, AZ, was on the briefs.

Ginger Jarvis, Assistant Arizona Attorney General, argued the cause for the appellee. Janet Napolitano, Arizona Attorney General; Randall M. Howe, Arizona Chief Counsel, Criminal Appeals Section; Diane M. Ramsey, Assistant Arizona Attorney General, were on the brief.

Appeal from the United States District Court for the District of Arizona; Roslyn O. Silver, District Judge, Presiding. D.C. No. CV-97-00560-ROS.

Before: STAPLETON,* O'SCANNLAIN and FERNANDEZ, Circuit Judges.

Opinion by Judge O'SCANNLAIN; Concurrence by Judge STAPLETON.

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* The Honorable Walter K. Stapleton, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

ORDER AND AMENDED OPINION ORDER

The opinion and concurrence filed on January, 23, 2003, and appearing at 317 F.3d 1038 (9th Cir.2003), are amended. The amended opinion and concurrence are filed herewith.

The panel has voted unanimously to deny the petition for rehearing. Judge O'Scannlain has voted to deny the petition for rehearing en banc, and Judge Stapleton and Judge Fernandez so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for panel or en banc rehearing will be entertained.

OPINION

O'SCANNLAIN, Circuit Judge:

In this petition for writ of habeas corpus, we must decide whether a state court's determination – that the admission into evidence of a murder suspect's confession did not violate the Constitution – was contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court.

I

On May 15, 1991, Cynthia Tomecko reported to Phoenix police that her mother, Anita Clark, was missing. Police focused attention on Billy Russell Clark, Anita Clark's stepson, when they learned that he had sold her

automobile to a California automobile dealership. Clark was arrested on May 24, at about 11:00 a.m., attempting to pick up a check mailed from the California dealership at a post office box in Chandler, Arizona. After the arresting officer read Clark his *Miranda*[1] rights, Clark stated that he understood those rights, and he was taken to the Phoenix police station, where he spent the balance of the day.

The first person to interview Clark was Detective Masino. There is some ambiguity in the record with respect to the size of the interview room, which was either six feet by eight, or eight feet by ten. It was furnished with a table and two or three chairs. It did not contain a drinking fountain or a toilet. At no time during this interview or the next did Clark ask to use such facilities. The interview with Detective Masino focused on the theft of the victim's car, and lasted approximately 35 minutes. Detective Masino prefaced the interview by asking Clark if he understood his *Miranda* rights, and Clark responded in the affirmative. During the course of this interview, Clark admitted that he had stolen Anita Clark's car, that he had done so for money, and that he had stolen the car on May 14, the day before Anita Clark was reported missing. Detective Masino terminated the interview at approximately 12:45 p.m.

Later in the afternoon, a second interview took place. This time, Detective Masino was accompanied by Detective Chambers, a homicide detective assigned to investigate the

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

disappearance of Anita Clark. The interview began at approximately 4:00 p.m. Initially, Detective Masino conducted the interview, but after about twenty minutes detective Masino left the room and Detective Chambers took over. Detective Chambers identified himself as a homicide detective brought in to investigate the disappearance of Anita Clark, and notified Clark of his *Miranda* rights, reading them verbatim from a standard "rights card" supplied by the Phoenix police department. When the detective asked Clark if he understood those rights, Clark responded "yes, I do."

In the ensuing interview, Clark attempted to provide an explanation for taking his stepmother's car. Detective Chambers responded that there were serious problems with this story. Clark's reply was "I think I would like to talk to a lawyer."[2] Detective Chambers responded as follows:

> I told him if you – if he wanted a lawyer I would call him one. I told him I expected, if in fact he wanted a lawyer and I called him one, our dialogue would be over. I told him that [his sister] was there, I wanted to talk to her. That I was going to leave him alone for a few minutes to make

[2] There is some inconsistency in the record as to the precise phrasing Clark used. Testifying at the hearing on Clark's pre-trial motion to suppress the confession, Detective Chambers "quoted" Clark as stating "I think I would like to talk to a lawyer" and "I think I'd like to talk to a lawyer." The Arizona Court of Appeals considered Clark's constitutional challenge based on the former phrasing, as did the district court. We do the same. We note, however, that nothing in our analysis hinges on a distinction – if indeed there is any – between "I think I would like to talk to a lawyer" and "I think I'd like to talk to a lawyer."

a decision, and that when I returned to him I would expect his answer.

Clark acknowledged that he understood, and Detective Chambers left the interview room to interview Clark's sister. A half hour later, the detective returned to the interview room. Clark spoke first. He told the detective that he did not want a lawyer, and that he wanted to continue talking, adding by way of explanation that it was helping him to deal with the situation by talking to the detective.

The interview continued. After another twenty minutes Clark said to the detective, "should I be telling you or should I talk to a lawyer?" The detective's response was "are you asking for my personal opinion or my professional opinion?" Clark responded that he wanted the detective's opinion, should he be talking to a lawyer or should he talk to the detective? After a long silence of two minutes or so, the detective told Clark that in his personal opinion, should the case go to trial, a judge or a jury would be concerned with remorse. Using his hands as scales to illustrate his point, the detective told Clark that the judge or jury would weigh fear of punishment as against any remorse over what happened, and that in his [the detective's] opinion, remorse should outweigh fear of punishment. Clark responded, "well, let's talk about it then."

Soon after, Clark confessed to murdering his stepmother. He described how he found Anita Clark at home when he had not expected her to be there. They apparently had an argument, and Clark told the detective how he had taken hold of her head and snapped her neck, and how she collapsed immediately on the floor. He told the detective that after he realized what he had done, he panicked,

placed her body into the trunk of her car, and drove out to the desert to dispose of the body. Later that night, Clark led detective Chambers and another homicide detective, Bob Mills, to the burial site, which was approximately 67 miles outside Phoenix, near Tumbleweed, Arizona. There, Clark led the detectives to the burial site, where they found the charred remains of Anita Clark.

Clark was indicted on one count of first degree murder and one count of theft. Before trial, Clark moved to suppress his confession, claiming it was taken in violation of *Miranda* and its progeny, and that it was involuntary. The motion was denied, and the confession was admitted at trial. Clark's position at trial was that he was lying when he confessed to the police. He admitted to burning and burying his stepmother's body and then stealing and selling her car, but he maintained that he did not kill her. He alleged that he discovered his step-mother's [sic] body in the hallway, that he thought his father had killed her, and that he disposed of the body in order to protect his father. The jury convicted Clark of second degree murder, and theft of property. Clark was sentenced to consecutive, maximum, aggravated terms of twenty years imprisonment on the murder conviction, and ten years for theft.

On appeal to the Arizona Court of Appeals, Clark alleged that the trial court erred in denying his motion to suppress the confession, because it was taken in violation of *Miranda*, and it was involuntary. The Court of Appeals affirmed the convictions. The Court of Appeals found that the statement "I think I would like to talk to a lawyer" was ambiguous, and therefore the police were not required to cease questioning. It further found that, considering the totality of the circumstances, Clark's statement was voluntary. The Arizona Supreme Court denied review.

Clark filed a petition for writ of habeas corpus in the United States District Court for the District of Arizona, raising the same grounds for relief as were raised in state court. The case was referred to a magistrate judge, who issued a report and recommendation in January, 1998. The magistrate concluded that Clark made an unambiguous request for counsel, and that it was unreasonable for the state court to hold otherwise. The magistrate nonetheless found that Clark was not entitled to relief because he had subsequently waived his right to counsel. He also found that the statement was voluntarily given. The district court rejected that part of the magistrate judge's report which found that Clark had made an unambiguous request for counsel. The court concluded that the Arizona Court of Appeals' finding that Clark's statement was ambiguous was not contrary to or an unreasonable application of clearly established federal law. The district court further found Clark's confession was voluntary, and there was no due process violation in admitting it at trial.

Clark filed a timely notice of appeal. On August 18, 2000, the district court entered an order denying a certificate of appealability, stating that probable cause did not exist for the appeal. Our court granted a certificate of appealability on February 21, 2001 on the issue whether the state trial court erred by denying Clark's motion to suppress his post-arrest statements because (1) they were obtained in violation of his *Miranda* rights, or (2) they were involuntary.

II

A

A district court's decision to grant or to deny a petition for habeas corpus is reviewed de novo. *Dows v. Wood,* 211 F.3d 480, 484 (9th Cir.2000). Clark's petition was filed in March, 1997, after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Therefore, AEDPA's provisions apply, and our review is limited by the standard set forth in 28 U.S.C. § 2254(d). Under AEDPA, we may not grant federal habeas relief unless we conclude that Arizona's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court has said that § 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy,* 521 U.S. 320, 333 n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti,* 537 U.S. 19, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002) (per curiam). This deferential review in habeas cases is premised on the fact that the state courts, as part of a co-equal judiciary, are competent interpreters of federal law deserving of our full respect. *See Williams v. Taylor,* 529 U.S. 362, 403, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

In *Williams,* the Supreme Court made it clear that the "contrary to" and "unreasonable application" clauses have distinct meanings. *Id.* at 404, 120 S.Ct. 1495. A decision is contrary to clearly established federal law if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but

nonetheless reaches a different result. *Id.* at 413-14, 120 S.Ct. 1495.

A state court's decision involves an unreasonable application of federal law if "the state court identifies the correct governing legal principle ... but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 529 U.S. at 413, 120 S.Ct. 1495. In *Williams* and in subsequent decisions the Supreme Court has repeatedly emphasized that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410, 120 S.Ct. 1495 (emphasis in original); *Penry v. Johnson,* 532 U.S. 782, 793, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) ("Even if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable."); *Woodford,* 123 S.Ct. at 360(a federal court may not "substitut[e] its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)."); *Early v. Packer,* 537 U.S. 3, 123 S.Ct. 362, 366, 154 L.Ed.2d 263 (2002) (per curiam) (holding that habeas relief is not proper where state court decision was only "merely erroneous").

Finally, two points of clarification with respect to our treatment of habeas petitions are necessary in light of recent Supreme Court precedent. The first issue is the standard for determining whether application of federal law by a state court is unreasonable for purposes of granting relief under AEDPA. In *Van Tran v. Lindsey,* 212 F.3d 1143, 1152-54 (9th Cir.2000), we held that, under AEDPA, a state court's decision is an "unreasonable application" of clearly established federal law if "clear error occurred." In *Lockyer v. Andrade,* ___ U.S. ___, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003), the Supreme Court

made it clear that this standard fails to give proper deference to the state courts. The Supreme Court explained,

> The Ninth Circuit made an initial error in its "unreasonable application" analysis. In *Van Tran v. Lindsey,* 212 F.3d at 1152-54, the Ninth Circuit defined "objectively unreasonable" to mean "clear error." These two standards, however, are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness. *See Williams v. Taylor, supra,* at 410, 120 S.Ct. 1495; *Bell v. Cone,* 535 U.S. at 699, 122 S.Ct. 1843.
>
> It is not enough that a federal habeas court, in its "independent review of ' the legal question" is left with a "firm conviction" that the state court was "erroneous" 270 F.3d at 753 (quoting *Van Tran v. Lindsey, supra,* at 1153-54). We have held precisely the opposite: "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor,* 529 U.S. at 411, 120 S.Ct. 1495. Rather, that application must be objectively unreasonable.

Id. at 123 S.Ct. at 1174-75.

We follow, as we must, our marching orders from the Supreme Court, and now hold that a reversal is warranted under AEDPA's "clearly erroneous" provision only if the state court's application of federal law is *objectively* unreasonable. *Id.*; *see also Cook v. McKune,* 323 F.3d 825 (10th Cir.2003) (" 'Unreasonableness' is gauged by an objective standard."). The writ may not issue simply because, in our

determination, a state court's application of federal law was erroneous, clearly or otherwise. While the "objectively unreasonable" standard is not self-explanatory, at a minimum it denotes a greater degree of deference to the state courts than we have previously afforded them. This much, at least, is obvious, particularly in light of the Supreme Court's rejection of the "clear error" standard for issuance of the writ.

The Supreme Court clarified another aspect of our habeas jurisprudence in *Lockyer.* Our precedents formerly required a two-step inquiry under AEDPA; we first asked "whether the state court erred at all," *Anthony v. Cambra,* 236 F.3d 568, 578 (9th Cir.2000), and assuming the answer was yes, only *then* did we apply AEDPA's standard of review. The Supreme Court rejected this approach,

> The Ninth Circuit requires federal habeas courts to review the state court decision *de novo* before applying the AEDPA standard of review. We disagree with this approach. AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1) – whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law.

Lockyer, 123 S.Ct. at 1172.

In *Lockyer,* the Supreme Court "[did] not reach the question whether the state court erred." *Id.* The Court's focus was "solely on whether § 2254(d) forecloses habeas relief." *Id.* Thus, to the extent *Van Tran* and our subsequent precedent *requires* [sic] a two-step consideration of habeas petitions, such precedent has been overruled. Our own independent consideration of the constitutional issue

is neither relevant, nor necessary to dispose of the question presented. *See Bell v. Jarvis,* 236 F.3d 149, 162 (4th Cir.2000) (en banc) ("[A]ny independent opinions we offer on the merits of the constitutional claims will have no determinative effect in the case before us, nor any precedential effect for state courts in future cases."); *Valdez v. Cockrell,* 274 F.3d 941, 954 n. 19 (5th Cir.2001) ("[W]e do not read the . . . Supreme Court cases to require [a] two-step inquiry. . . ."). "[T]he only question that matters under § 2254(d)(1)," *Lockyer,* 123 S.Ct. at 1171, is whether or not the Arizona state court's decision is contrary to, or involved an unreasonable application of, clearly established Federal law.

In attempting to answer that question, the *only* definitive source of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. *Williams,* 529 U.S. at 412, 120 S.Ct. 1495. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, *Duhaime v. Ducharme,* 200 F.3d 597, 600-01 (9th Cir.1999), only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. *See Williams,* 529 U.S. at 412, 120 S.Ct. 1495 ("The . . . statutory language makes clear . . . that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.").

With these principles in mind, we turn to the merits of the claim.

B

1

Clark's primary contention on appeal is that the state trial court erred in admitting his confession at trial because it was taken in violation of *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), which requires all questioning to cease once an accused requests counsel. Specifically, he argues that his statement, "I think I would like to talk to a lawyer" was an unequivocal request for counsel, and that request went unheeded. His confession should therefore have been suppressed. The Arizona court's decision to the contrary, the petitioner argues, involves an unreasonable application of federal law, and therefore habeas relief is warranted.

Of course, a suspect subject to custodial interrogation has a Fifth and Fourteenth Amendment right to consult with an attorney and to have an attorney present during questioning, and the police must explain this right to the suspect before questioning. *Miranda,* 384 U.S. at 469-73, 86 S.Ct. 1602. When an accused invokes his right to have counsel present during custodial interrogation, he may not be subjected to further questioning by the authorities until a lawyer has been made available or the suspect himself reinitiates conversation. *Edwards,* 451 U.S. at 484-85, 101 S.Ct. 1880. This rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey,* 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990). The "rigid prophylactic rule" of *Edwards* requires a court to "determine whether the accused actually invoked his right to counsel." *Smith v. Illinois,* 469 U.S. 91, 95, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) (quoting *Fare v. Michael C.,* 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)). In

Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), the Supreme Court held that "[t]o avoid difficulties of proof and to provide guidance to officers conducting interrogations," the determination whether an accused actually invoked his right to counsel is "an objective inquiry." *Id.* at 458-59, 114 S.Ct. 2350. The suspect must "unambiguously request counsel." *Id.* at 459, 114 S.Ct. 2350 "Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* In *Davis,* the Supreme Court found that the statement, "[m]aybe I should talk to a lawyer," was ambiguous, and hence was not a request for counsel. *Id.* at 462, 114 S.Ct. 2350.

The Supreme Court in *Davis* specifically declined to extend the *Edwards* prophylaxis to situations where a suspect makes a vague or ambiguous reference to an attorney. *Id.* at 459, 114 S.Ct. 2350 ("If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect."); *McNeil v. Wisconsin,* 501 U.S. 171, 178, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) ("[T]he *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards.*") (emphasis in original). This is so because if a questioning officer reasonably does not know whether or not the suspect wants a lawyer, requiring the cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Michigan v. Mosley,* 423 U.S. 96, 102, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). The *Edwards* rule seeks to "maintain a delicate balance between ensuring that

suspects are properly insulated against police overreaching while allowing the law enforcement community to perform its duties effectively." *Smith v. Endell,* 860 F.2d 1528, 1537 (9th Cir.1988) (O'Scannlain, J., dissenting). In sum, unless the accused makes an unambiguous request for counsel, the authorities are free to continue questioning.

In *Davis,* the Supreme Court found that the phrase "[m]aybe I should talk to a lawyer" was ambiguous, and therefore the police were not required to cease questioning. 512 U.S. at 462, 114 S.Ct. 2350. In this case, Clark's statement was "I think I would like to talk to a lawyer." The distinction, if indeed there is any, is in the qualifying clauses – "I think I would" instead of "maybe I should." Both phrases are equivocal to some degree, and critical to the Arizona court's determination was Clark's use of the words "I think," which it found equivocal. *See United States v. McLaren,* 38 M.J. 112, 115 (1993) (holding that the words "I think" used by a suspect "could render a request for counsel equivocal"). Given that *Davis* is the *only* word from the Supreme Court as to whether or not a suspect's statement was an unambiguous request for counsel, the Arizona state court's conclusion that Clark's statement was equivocal could hardly be said to be objectively unreasonable.

While *only* the Supreme Court's precedents are binding on the Arizona court, and only those precedents need be reasonably applied, we may look for guidance to circuit precedents. *See Duhaime,* 200 F.3d at 600-01. Our own precedent is not much help since it is somewhat inconsistent on what constitutes an equivocal request for a lawyer. The only case containing the critical words "I think" is *Shedelbower v. Estelle,* 885 F.2d 570, 571 (9th

Cir.1989), where we assumed without deciding that the statement "[y]ou know, I'm scared now. I think I should call an attorney," was a valid invocation of the suspect's right to an attorney. However, that case pre-dates the Supreme Court's decision in *Davis,* and nothing in the court's analysis hinged on the presence or absence of the phrase "I think."

Our post-*Davis* cases differ significantly from this case on their facts, and therefore provide little guidance. *See e.g., Alvarez v. Gomez,* 185 F.3d 995, 998 (9th Cir.1999) (finding suspects questions "(1) Can I get an attorney right now, man? (2) You can have attorney right now? and (3) Well, like right now you got one?" constituted an unambiguous request); *United States v. Doe,* 170 F.3d 1162, 1166 (9th Cir.1999) (holding the statement "What time will I see a lawyer?" not an unambiguous request for counsel); *United States v. Doe,* 60 F.3d 544, 546 (9th Cir.1995) ("maybe he ought to see an attorney" not a clear and unambiguous request for counsel); *United States v. Cheely,* 36 F.3d 1439, 1448 (9th Cir.1994) ("my attorney does not want me to talk to you" in tandem with a refusal to sign written waiver of right to attorney form was an unambiguous request for counsel).

Other circuits to have considered a suspect's statement containing the words "I think" have reached opposite conclusions. In a decision predating *Davis,* the Eleventh Circuit assumed without analysis that the statement "I think I should call my lawyer" was an unequivocal request for counsel. *Cannady v. Dugger,* 931 F.2d 752, 754 (11th Cir.1991). Similarly, in a pre-*Davis* decision the Fifth Circuit found that the phrase "I think I want to talk to a lawyer" was an unequivocal request for counsel. *United States v. Perkins,* 608 F.2d 1064, 1066 (5th Cir.1979). On

the other hand, two circuits that have considered similar language post-*Davis* found that there was no unequivocal request for counsel. The Second Circuit in *Diaz v. Senkowski,* 76 F.3d 61, 63 (2d Cir.1996) found a suspect's statement "[d]o you think I need a lawyer" was ambiguous within the meaning of *Davis.* The statement in this case is more emphatic than the one considered in *Diaz,* in that it is not in the form of an interrogatory. In *Burket v. Angelone,* 208 F.3d 172, 198 (4th Cir.2000), the Fourth Circuit considered the statement "I think I need a lawyer." The court held that "[t]his statement does not constitute an unequivocal request for counsel. In fact, Burket's statement is quite similar to the defendant's statement in *Davis* ('Maybe I should talk to a lawyer'), which the Supreme Court found ambiguous." *Id.* at 198. The statement at issue here, if anything, is *more* ambiguous than the one at issue in *Burket,* since Clark stated that he *thought* he would *like* to talk to an attorney.

We conclude that the Arizona court's determination that Clark's statement did not constitute an unambiguous and unequivocal request for counsel within the meaning of *Davis* was not contrary to clearly established Federal law, nor was it an objectively unreasonable application of such law. The Arizona court of appeals properly identified the relevant threshold question – whether or not Davis actually invoked his right to counsel thereby triggering *Edwards* – and applied the correct controlling authority. To avoid being "contrary to" Supreme Court precedent, a state court is not required to cite Supreme Court cases or even be aware of Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early,* 123 S.Ct. at 365.

Nor was the Arizona court's application of the principles enunciated in *Davis* and *Edwards* objectively unreasonable. The very fact that circuit courts have reached differing results on similar facts leads inevitably to the conclusion that the Arizona court's rejection of Clark's claim was not objectively unreasonable. Whether or not we think there is any *constitutional* difference between the statement in *Davis* and the statement at issue here is irrelevant – we express no "independent" opinion on the merits of the constitutional claim. Under AEDPA, the *only* question we are asked to decide is whether the state court's determination to the contrary was objectively unreasonable and it was surely not. Were we to disagree with the Arizona court's adjudication of the claim, the principles of comity and respect for the Arizona court's status as a co-equal adjudicator of constitutional issues that AEDPA reflects would require us to defer to its reasonable adjudication of the merits of the *Edwards* claim.

In light of the above discussion, it follows that the Arizona court's determination that Clark's subsequent statement "should I be telling you, or should I talk to an attorney?" was not an unambiguous request for counsel was not contrary to or an unreasonable application of clearly established Federal law. In fact, given the Supreme Court's decision in *Davis,* Clark's questions probably did not even rise to the level of an *equivocal* request for an attorney. *See Ogbuehi,* 18 F.3d at 813-14 ("Do I need a lawyer?" or "Do you think I need a lawyer?" not even an equivocal request for a lawyer); *United States v. Jara,* 973 F.2d 746, 750 (9th Cir.1992) (stating that "Should I call my lawyer?" might not even constitute an equivocal request for a lawyer).

2

Because we decide that the state court's determination that Clark did not unambiguously invoke his constitutional right to counsel was not objectively unreasonable, we need not reach the issue of whether or not Clark subsequently waived that right.

C

Next, Clark claims that his confession was involuntary, and that the state court's determination to the contrary was objectively unreasonable. He argues that because he was kept "for over 5 hours in a 6 by 8 foot locked, windowless room with no toilet or water facilities provides ample evidence that the statements given were involuntary." Appellant's Opening Brief, at 29. He further argues that his confession was given because detective Chambers impliedly promised that Clark would receive lenient treatment from the judge and jury. Considering the circumstances in their totality, he argues, his statements were involuntary.

The Fourteenth Amendment to the Constitution requires the suppression of statements obtained by "techniques and methods offensive to due process." *Haynes v. Washington,* 373 U.S. 503, 515, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). To be admissible, a suspect's statement must be voluntary, and in determining whether a statement was voluntary, the question is "whether the defendant's will was overborne at the time he confessed." *Id.* at 513, 83 S.Ct. 1336; *see also Amaya-Ruiz v. Stewart,* 121 F.3d 486, 494 (9th Cir.1997) (the test is "whether . . . the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's

will was overborne."). There is no "talismanic definition of 'voluntariness'" that is "mechanically applicable." *Schneckloth v. Bustamonte,* 412 U.S. 218, 224, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Rather, we must assess the totality of all the surrounding circumstances. *Id.* at 226, 93 S.Ct. 2041. Those circumstances include "not only the crucial element of police coercion," but also the length of the interrogation, its location, and its continuity. *Withrow v. Williams,* 507 U.S. 680, 693, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). They may also include the failure of the police to advise the suspect of his rights, *Haynes,* 373 U.S. at 516-17, 83 S.Ct. 1336, as well as any direct or implied promises of a benefit. *Brady v. United States,* 397 U.S. 742, 753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

The Arizona state court, applying the principles enunciated by the Supreme Court in *Schneckloth,* found that the admission into evidence of Clark's statement complied with due process, and that holding was not objectively unreasonable. Clark was detained in an interview room in the Phoenix police station for approximately eight hours. The room itself was unremarkable in its size and nature. *See United States v. D'Antoni,* 856 F.2d 975, 981 (7th Cir.1988) (finding a standard interview room eight feet by twelve feet in size not coercive). So too was the length of the detention, and the intermittent questioning. *See Jenner v. Smith,* 982 F.2d 329, 334 (8th Cir.1993) (six or seven hour questioning not coercive); *Martin v. Wainwright,* 770 F.2d 918, 927 (11th Cir.1985), *modified by* 781 F.2d 185 (1986) (five hour intermittent questioning did not render confession involuntary); *United States v. Lehman,* 468 F.2d 93, 101 (7th Cir.1972) ("vigorous" eight hour questioning with few breaks did not make confession involuntary). Clark himself testified at the pre-trial

hearing that he never asked for food or water, or to use the facilities.

The conduct of the investigating detectives, for all we can tell from the record, was unimpeachable. Three separate times Clark was read his rights, and all three times Clark responded that he understood those rights. To the extent Clark now argues that his confession was given in reliance on an implied promise of favorable treatment, Detective Chambers made no such promise. Twenty minutes after Clark indicated to the detective that he wanted to continue talking, Clark asked the detective "should I be telling you or should I talk to an attorney?" In response, Detective Chambers, using his hands to illustrate the scales of justice, expressed his *opinion* that a judge and jury would weigh fear of punishment against remorse, and that in his *opinion,* remorse would outweigh the fear of punishment. Thus, there was no promise, implied or otherwise. *See Amaya-Ruiz,* 121 F.3d at 494 (findings [sic] statements "we can forgive your lies, but the United States Court system will not forgive your lies" and "if he wants any forgiveness, he should tell the truth" not coercive). "There is nothing inherently wrong with efforts to create a favorable climate for confession." *Jenner,* 982 F.2d at 334 (quoting *Hawkins v. Lynaugh,* 844 F.2d 1132, 1140 (5th Cir.1988)). "[V]ery few people give incriminating statements in the absence of official action of some kind." *Schneckloth,* 412 U.S. at 224, 93 S.Ct. 2041. In sum, the Arizona court found that the typical indicia of coercion are wholly absent in this record, and its decision is neither contrary to, nor an unreasonable application of Supreme Court precedents.

III

We conclude that the state court's determination that there was no *Miranda* violation, and that Clark's confession was voluntary, was neither contrary to nor an unreasonable application of clearly established federal law, as determined by the Supreme Court.

The judgment of the district court is hereby AFFIRMED.

STAPLETON, Circuit Judge, concurring:

I agree with my colleagues that the state court's resolution of Clark's claims was neither contrary to, nor an unreasonable application of, clearly established federal law. I reach my conclusions by a somewhat different route, however.

This case is difficult because Clark's statement – "I think I would like to talk to a lawyer" – reflects at least a tentative decision in favor of having a lawyer. It does not, however, indicate unequivocally that a final decision has been made.

Such a statement presents a more appealing case than did the statement in *Davis*[1] – "Maybe I should talk to a lawyer" – for a rule that the interrogating officer must provide an opportunity for reflection and seek clarification before continuing the substantive interrogation. While the *Davis* Court's interest in drawing a bright-line suggests to me that a majority of the Supreme Court would find no

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[1] *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

such duty here, a prediction on that score is unnecessary because Clark's interrogator chose to do just that: he provided an opportunity for reflection and sought clarification. Even if this case be viewed as distinguishable from *Davis,* nothing in the Supreme Court case law suggests to me that the interrogator's conduct here constitutes a violation of the Fifth or Fourteenth Amendment. To the contrary, the Court in *Davis,* while refusing to impose a duty to clarify in the circumstances there presented, recognized the utility of seeking clarification when uncertainty exists about the counsel issue:

> Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. That was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions.

Davis, 512 U.S. at 461, 114 S.Ct. 2350.

I would affirm the judgment of the district court.

317 F.3d 1038

Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.

Billy Russell **CLARK**, Petitioner-Appellant,
v.
Tim MURPHY, Respondent-Appellee.

No. 00-16727.

Argued and Submitted Nov. 5, 2002.
Filed Jan. 23, 2003.

James M. Jellison argued the cause for the appellant. Anders Rosenquist, Jr., Rosenquist & Associates, Phoenix, Arizona, was on the briefs.

Ginger Jarvis, Assistant Arizona Attorney General, argued the cause for the appellee. Janet Napolitano, Arizona Attorney General; Randall M. Howe, Arizona Chief Counsel, Criminal Appeals Section; Diane M. Ramsey, Assistant Arizona Attorney General, were on the brief.

Appeal from the United States District Court for the District of Arizona; Roslyn O. Silver, District Judge, Presiding. D.C. No. CV-97-00560-ROS.

Before: STAPLETON,* O'SCANNLAIN and FERNANDEZ, Circuit Judges.

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* The Honorable Walter K. Stapleton, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

O'SCANNLAIN, Circuit Judge.

In this petition for writ of habeas corpus, we must decide whether a state court's determination – that the admission into evidence of a murder suspect's confession did not violate the Constitution – was contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court.

I

On May 15, 1991, Cynthia Tomecko reported to Phoenix police that her mother, Anita Clark, was missing. Police focused attention on Billy Russell Clark, Anita Clark's stepson, when they learned that he had sold her automobile to a California automobile dealership. Clark was arrested on May 24, at about 11:00 a.m., attempting to pick up a check mailed from the California dealership at a post office box in Chandler, Arizona. After the arresting officer read Clark his *Miranda*[1] rights, Clark stated that he understood those rights, and he was taken to the Phoenix police station, where he spent the balance of the day.

The first person to interview Clark was Detective Masino. There is some ambiguity in the record with respect to the size of the interview room, which was either six feet by eight, or eight feet by ten. It was furnished with a table and two or three chairs. It did not contain a drinking fountain or a toilet. At no time during this interview or

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

the next did Clark ask to use such facilities. The interview with Detective Masino focused on the theft of the victim's car, and lasted approximately 35 minutes. Detective Masino prefaced the interview by asking Clark if he understood his *Miranda* rights, and Clark responded in the affirmative. During the course of this interview, Clark admitted that he had stolen Anita Clark's car, that he had done so for money, and that he had stolen the car on May 14, the day before Anita Clark was reported missing. Detective Masino terminated the interview at approximately 12:45 p.m.

Later in the afternoon, a second interview took place. This time, Detective Masino was accompanied by Detective Chambers, a homicide detective assigned to investigate the disappearance of Anita Clark. The interview began at approximately 4:00 p.m. Initially, Detective Masino conducted the interview, but after about twenty minutes detective Masino left the room and Detective Chambers took over. Detective Chambers identified himself as a homicide detective brought in to investigate the disappearance of Anita Clark, and notified Clark of his *Miranda* rights, reading them verbatim from a standard "rights card" supplied by the Phoenix police department. When the detective asked Clark if he understood those rights, Clark responded "yes, I do."

In the ensuing interview, Clark attempted to provide an explanation for taking his stepmother's car. Detective Chambers responded that there were serious problems with this story. Clark's reply was "I think I would like to

talk to a lawyer."[2] Detective Chambers responded as follows:

> I told him if you – if he wanted a lawyer I would call him one. I told him I expected, if in fact he wanted a lawyer and I called him one, our dialogue would be over. I told him that [his sister] was there, I wanted to talk to her. That I was going to leave him alone for a few minutes to make a decision, and that when I returned to him I would expect his answer.

Clark acknowledged that he understood, and Detective Chambers left the interview room to interview Clark's sister. A half hour later, the detective returned to the interview room. Clark spoke first. He told the detective that he did not want a lawyer, and that he wanted to continue talking, adding by way of explanation that it was helping him to deal with the situation by talking to the detective.

The interview continued. After another twenty minutes Clark said to the detective, "should I be telling you or should I talk to a lawyer?" The detective's response was "are you asking for my personal opinion or my professional

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[2] There is some inconsistency in the record as to the precise phrasing Clark used. Testifying at the hearing on Clark's pre-trial motion to suppress the confession, Detective Chambers 'quoted' Clark as stating "I think I would like to talk to a lawyer" and "I think I'd like to talk to a lawyer." The Arizona Court of Appeals considered Clark's constitutional challenge based on the former phrasing, as did the district court. We do the same. We note, however, that nothing in our analysis hinges on a distinction – if indeed there is any – between "I think I would like to talk to a lawyer" and "I think I'd like to talk to a lawyer."

opinion?" Clark responded that he wanted the detective's opinion, should he be talking to a lawyer or should he talk to the detective? After a long silence of two minutes or so, the detective told Clark that in his personal opinion, should the case go to trial, a judge or a jury would be concerned with remorse. Using his hands as scales to illustrate his point, the detective told Clark that the judge or jury would weigh fear of punishment as against any remorse over what happened, and that in his [the detective's] opinion, remorse should outweigh fear of punishment. Clark responded, "well, let's talk about it then."

Soon after, Clark confessed to murdering his stepmother. He described how he found Anita Clark at home when he had not expected her to be there. They apparently had an argument, and Clark told the detective how he had taken hold of her head and snapped her neck, and how she collapsed immediately on the floor. He told the detective that after he realized what he had done, he panicked, placed her body into the trunk of her car, and drove out to the desert to dispose of the body. Later that night, Clark led detective Chambers and another homicide detective, Bob Mills, to the burial site, which was approximately 67 miles outside Phoenix, near Tumbleweed, Arizona. There, Clark led the detectives to the burial site, where they found the charred remains of Anita Clark.

Clark was indicted on one count of first degree murder and one count of theft. Before trial, Clark moved to suppress his confession, claiming it was taken in violation of *Miranda* and its progeny, and that it was involuntary. The motion was denied, and the confession was admitted at trial. Clark's position at trial was that he was lying when he confessed to the police. He admitted to burning and burying his stepmother's body and then stealing and

selling her car, but he maintained that he did not kill her. He alleged that he discovered his stepmother's body in the hallway, that he thought his father had killed her, and that he disposed of the body in order to protect his father. The jury convicted Clark of second degree murder, and theft of property. Clark was sentenced to consecutive, maximum, aggravated terms of twenty years imprisonment on the murder conviction, and ten years for theft.

On appeal to the Arizona Court of Appeals, Clark alleged that the trial court erred in denying his motion to suppress the confession, because it was taken in violation of *Miranda,* and it was involuntary. The Court of Appeals affirmed the convictions. The Court of Appeals found that the statement "I think I would like to talk to a lawyer" was ambiguous, and therefore the police were not required to cease questioning. It further found that, considering the totality of the circumstances, Clark's statement was voluntary. The Arizona Supreme Court denied review.

Clark filed a petition for writ of habeas corpus in the United States District Court for the District of Arizona, raising the same grounds for relief as were raised in state court. The case was referred to a magistrate judge, who issued a report and recommendation in January, 1998. The magistrate concluded that Clark made an unambiguous request for counsel, and that it was unreasonable for the state court to hold otherwise. The magistrate nonetheless found that Clark was not entitled to relief because he had subsequently waived his right to counsel. He also found that the statement was voluntarily given. The district court rejected that part of the magistrate judge's report which found that Clark had made an unambiguous request for counsel. The court concluded that the Arizona Court of Appeals' finding that Clark's statement was

ambiguous was not contrary to or an unreasonable application of clearly established federal law. The district court further found Clark's confession was voluntary, and there was no due process violation in admitting it at trial.

Clark filed a timely notice of appeal. On August 18, 2000, the district court entered an order denying a certificate of appealability, stating that probable cause did not exist for the appeal. Our court granted a certificate of appealability on February 21, 2001 on the issue whether the state trial court erred by denying Clark's motion to suppress his post-arrest statements because (1) they were obtained in violation of his *Miranda* rights, or (2) they were involuntary.

II

A

A district court's decision to grant or to deny a petition for habeas corpus is reviewed de novo. *Dows v. Wood,* 211 F.3d 480, 484 (9th Cir.2000). Clark's petition was filed in March, 1997, after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Therefore, AEDPA's provisions apply, and our review is limited by the standard set forth in 28 U.S.C. § 2254(d). Under AEDPA, we may not grant federal habeas relief unless we conclude that Arizona's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court has said that § 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy,* 521 U.S. 320, 333 n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481

(1997), and "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti,* 537 U.S. 19, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002) (per curiam). This deferential review in habeas cases is premised on the fact that the state courts, as part of a co-equal judiciary, are competent interpreters of federal law deserving of our full respect. *See Williams v. Taylor,* 529 U.S. 362, 403, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

In *Williams,* the Supreme Court made it clear that the "contrary to" and "unreasonable application" clauses have distinct meanings. *Id.* at 404, 120 S.Ct. 1495. A decision is contrary to clearly established federal law if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result. *Id.* at 413-14, 120 S.Ct. 1495; *Van Tran v. Lindsey,* 212 F.3d 1143, 1150 (9th Cir.2000).

A state court's decision involves an unreasonable application of federal law if "the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 529 U.S. at 413, 120 S.Ct. 1495. In *Williams* and in subsequent decisions the Supreme Court has repeatedly emphasized that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410, 120 S.Ct. 1495 (emphasis in original); *Penry v. Johnson,* 532 U.S. 782, 793, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) ("Even if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable."); *Woodford,* 123 S.Ct. at 360 (a federal court may not "substitut[e]

its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)."); *Early v. Packer,* 537 U.S. 3, 123 S.Ct. 362, 366, 154 L.Ed.2d 263 (2002) (per curiam) (holding that habeas relief is not proper where state court decision was only "merely erroneous"). A reversal of the state court's decision as involving an "unreasonable application" is only required if "clear error occurred." *Van Tran,* 212 F.3d at 1154. We must be left with a "'firm' conviction that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the court adopted, was erroneous – in other words that clear error occurred." *Id.* at 1153-54.

Finally, in this circuit, review of a habeas petition under AEDPA requires a two-step inquiry. We must first ask "whether the state court erred at all." *Anthony v. Cambra,* 236 F.3d 568, 578 (9th Cir.2000) (citing *Van Tran,* 212 F.3d at 1155). If the answer is yes, then we apply the AEDPA standard of review, which inquires whether the state court's "error" was contrary to, or involved an unreasonable application of, clearly established federal law, as defined by the Supreme Court.[3] The *only* definitive source

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[3] Our circuit stands alone in mandating a two-step methodological approach to § 2254 review. This approach, which *requires* de novo consideration as an initial, prior step in a 2254 determination, first adopted in *Van Tran,* 212 F.3d at 1155, has been specifically rejected by two circuits, *see Valdez v. Cockrell,* 274 F.3d 941, 954 n. 19 (5th Cir.2001); *Bell v. Jarvis,* 236 F.3d 149, 160 (4th Cir.2000) (en banc), and conflicts with two others, which permit, but do not require, a two-step methodology. *See Kruelski v. Connecticut Superior Court,* 316 F.3d 103 (2d Cir.2003); *Hurtado v. Tucker,* 245 F.3d 7, 16 (1st Cir.2001) (*allowing* but not *requiring* de novo review of underlying constitutional issue "[i]n a particular habeas case."). Given that there are now three separate judicial interpretations of our jurisdictional mandate, Supreme Court resolution of this issue may ultimately be in order.

of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. *Williams,* 529 U.S. at 412, 120 S.Ct. 1495. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, *Van Tran,* 212 F.3d at 1154; *Duhaime v. Ducharme,* 200 F.3d 597, 600-01 (9th Cir.1999), "only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." *Van Tran,* 212 F.3d at 1154 (quotations in original omitted).

With these principles in mind, we turn to the merits of the claim.

B

1

Clark's primary contention on appeal is that the state trial court erred in admitting his confession at trial because it was taken in violation of *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), which requires all questioning to cease once an accused requests counsel. Specifically, he argues that his statement, "I think I would like to talk to a lawyer" was an unequivocal request for counsel, and that request went unheeded. His confession should therefore have been suppressed. The state argues that Clark never unambiguously invoked his right to counsel, and that even if the state court erred in so finding, he validly waived that right soon thereafter when he told detective Chambers that he wanted to continue talking.

Of course, a suspect subject to custodial interrogation has a Fifth and Fourteenth Amendment right to consult with an attorney and to have an attorney present during questioning, and the police must explain this right to the suspect before questioning. *Miranda,* 384 U.S. at 469-73, 86 S.Ct. 1602. When an accused invokes his right to have counsel present during custodial interrogation, he may not be subjected to further questioning by the authorities until a lawyer has been made available or the suspect himself reinitiates conversation. *Edwards,* 451 U.S. at 484-85, 101 S.Ct. 1880. This rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey,* 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990). The "rigid prophylactic rule" of *Edwards* requires a court to "determine whether the accused actually invoked his right to counsel." *Smith v. Illinois,* 469 U.S. 91, 95, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) (quoting *Fare v. Michael C.,* 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)). In *Davis v. United States,* 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), the Supreme Court held that "[t]o avoid difficulties of proof and to provide guidance to officers conducting interrogations," the determination whether an accused actually invoked his right to counsel is "an objective inquiry." *Id.* at 458-59, 114 S.Ct. 2350. The suspect must "unambiguously request counsel." *Id.* at 459, 114 S.Ct. 2350 "Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* In *Davis,* the Supreme Court found that the statement, "[m]aybe I should talk to a lawyer," was ambiguous, and

hence was not a request for counsel. *Id.* at 462, 114 S.Ct. 2350.

The Supreme Court in *Davis* specifically declined to extend the *Edwards* prophylaxis to situations where a suspect makes a vague or ambiguous reference to an attorney. *Id.* at 459, 114 S.Ct. 2350 ("If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect."); *McNeil v. Wisconsin,* 501 U.S. 171, 178, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) ("[T]he *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards.*") (emphasis in original). This is so because if a questioning officer reasonably does not know whether or not the suspect wants a lawyer, requiring the cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Michigan v. Mosley,* 423 U.S. 96, 102, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). The *Edwards* rule seeks to "maintain a delicate balance between ensuring that suspects are properly insulated against police overreaching while allowing the law enforcement community to perform its duties effectively." *Smith v. Endell,* 860 F.2d 1528, 1537 (9th Cir.1988) (O'Scannlain, J., dissenting). In sum, unless the accused makes an unambiguous request for counsel, the authorities are free to continue questioning.

In *Davis,* the Supreme Court found that the phrase "[m]aybe I should talk to a lawyer" was ambiguous, and therefore the police were not required to cease questioning. 512 U.S. at 462, 114 S.Ct. 2350. In this case, Clark's statement was "I think I would like to talk to a lawyer." The distinction, if indeed there is any for constitutional purposes, is in the qualifying clauses – "I think I would"

instead of "maybe I should." Both phrases are equivocal to some degree, and critical to the Arizona court's determination was Clark's use of the words "I think," which it found equivocal. To "think" is "to form or have (as a thought) in the mind," or "to reflect on" or "ponder." *See* Webster's Third New International Dictionary (1986). The words "I think" used by a suspect "could render a request for counsel equivocal," *see United States v. McLaren,* 38 M.J. 112, 115 (1993), but without knowing Clark's tone of voice, inflection, and more about the context in which the statement was made, it is difficult to tell just *how* equivocal his statement was. "[L]anguage . . . must be evaluated in the context of the circumstances in which it was spoken." *Id.*

Ninth circuit law is somewhat inconsistent on what qualifies as unequivocal and what constitutes an equivocal request for a lawyer. In *United States v. Fouche,* 776 F.2d 1398, 1405 (9th Cir.1985), we held that a suspect's statement that he *might* want to talk to a lawyer constituted an equivocal request for an attorney. In *Norman v. Ducharme,* 871 F.2d 1483, 1486 (9th Cir.1989), we held that an inquiry whether the police officer thinks that the interrogated person in custody needs an attorney does not constitute even an equivocal request for a lawyer. In *United States v. Ogbuehi,* 18 F.3d 807, 814 (9th Cir.1994) we concluded that the statements "do I need a lawyer?" or "do you think I need a lawyer" did not rise to the level of even an equivocal request for an attorney. The only case containing the critical words "I think" is *Shedelbower v. Estelle,* 885 F.2d 570, 571 (9th Cir.1989), where we assumed without deciding that the statement "[y]ou know, I'm scared now. I think I should call an attorney," was a valid invocation of the suspect's right to an attorney. However, nothing in the court's analysis hinged on the

presence or absence of the phrase "I think." In *Smith,* 860 F.2d at 1529, we found the suspect's statement, "Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?" was an unambiguous request for counsel.

Our post-*Davis* cases differ significantly from this case on their facts, and therefore provide little guidance. *See e.g., Alvarez v. Gomez,* 185 F.3d 995, 998 (9th Cir.1999) (finding suspect's questions "(1) Can I get an attorney right now, man? (2) You can have attorney right now? and (3) Well, like right now you got one?" constituted an unambiguous request); *United States v. Doe,* 170 F.3d 1162, 1166 (9th Cir.1999) (holding the statement "What time will I see a lawyer?" not an unambiguous request for counsel); *United States v. Doe,* 60 F.3d 544, 546 (9th Cir.1995) ("maybe he ought to see an attorney" not a clear and unambiguous request for counsel); *United States v. Cheely,* 36 F.3d 1439, 1448 (9th Cir.1994) ("my attorney does not want me to talk to you" in tandem with a refusal to sign written waiver of right to attorney form was an unambiguous request for counsel).

Other circuits to have considered a suspect's statement containing the words "I think" have reached opposite conclusions. In a decision predating *Davis,* the Eleventh Circuit assumed without analysis that the statement "I think I should call my lawyer" was an unequivocal request for counsel. *Cannady v. Dugger,* 931 F.2d 752, 754 (11th Cir.1991). Similarly, in a pre-*Davis* decision the Fifth Circuit found that the phrase "I think I want to talk to a lawyer" was an unequivocal request for counsel. *United States v. Perkins,* 608 F.2d 1064, 1066 (5th Cir.1979). On the other hand, two circuits that have considered similar

language post-*Davis* found that there was no unequivocal request for counsel. The Second Circuit in *Diaz v. Senkowski,* 76 F.3d 61, 63 (2d Cir.1996) found a suspect's statement "[d]o you think I need a lawyer" was ambiguous within the meaning of *Davis.* The statement in this case is more emphatic than the one considered in *Diaz,* in that it is not in the form of an interrogatory. In *Burket v. Angelone,* 208 F.3d 172, 198 (4th Cir.2000), the Fourth Circuit considered the statement "I think I need a lawyer." The court held that "[t]his statement does not constitute an unequivocal request for counsel. In fact, Burket's statement is quite similar to the defendant's statement in *Davis* ("Maybe I should talk to a lawyer"), which the Supreme Court found ambiguous." *Id.* at 198. The statement at issue here, if anything, is *more* ambiguous than the one at issue in *Burket,* since Clark stated that he *thought* he would *like* to talk to an attorney.

While the issue is a close one, we conclude that Clark's statement that he thought he would like to talk to a lawyer did not constitute an unambiguous and unequivocal request for counsel within the meaning of *Davis.* Even more so than the suspect's statement in *Burket,* Clark failed to "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer" standing in detective Chambers' shoes would have understood the statement to be a request for counsel. *Davis,* 512 U.S. at 459, 114 S.Ct. 2350; *see also McLaren,* 38 M.J. at 115 (the use of the phrase "I think" by itself "could render a request for counsel equivocal"). A reasonable police officer in detective Chambers' situation may or may not have understood Clark to be asking for a lawyer, and "[t]he *likelihood* that a suspect would wish counsel to be present" is simply "not the test for applicability of *Edwards.*"

McNeil, 501 U.S. at 178, 111 S.Ct. 2204 (emphasis in original). If a questioning officer is reasonably unsure as to whether or not the suspect wants a lawyer, then to require the cessation of questioning would "transform the *Miranda* safeguards" into "irrational obstacles to legitimate police investigative activity," *Mosley,* 423 U.S. at 102, 96 S.Ct. 321, and this we may not do. In short, there is simply not enough of a distinction between "maybe I should" and "I think I would" to say that in the former case there is no invocation of the right to counsel, but in the latter there is.

In light of the above discussion, it follows that Clark's subsequent statement "should I be telling you, or should I talk to an attorney?" was not an unambiguous request for counsel. In fact, under our precedent, Clark's questions probably did not even rise to the level of an *equivocal* request for an attorney. *See Ogbuehi,* 18 F.3d at 813-14 ("Do I need a lawyer?" or "Do you think I need a lawyer?" not even an equivocal request for a lawyer); *United States v. de la Jara,* 973 F.2d 746, 750 (9th Cir.1992) (stating that "Should I call my lawyer?" might not even constitute an equivocal request for a lawyer).

2

Because we conclude the state court made no error in finding Clark's statement was not an unambiguous request for counsel, it follows that there was no "clear error." *Van Tran,* 212 F.3d at 1154. The Arizona court of appeals properly identified the relevant threshold question – whether or not Davis actually invoked his right to counsel thereby triggering *Edwards* – and applied the correct controlling authority. To avoid being "contrary to" Supreme Court precedent, a state court is not required to cite

Supreme Court cases or even be aware of Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early,* 123 S.Ct. at 365.

The very fact that the merits of the *Edwards* claim present a close call and that courts have reached differing results leads inevitably to the conclusion that the Arizona court's rejection of Clark's claim was not unreasonable. Whether or not we think there is any *constitutional* difference between the statement in *Davis* and the statement at issue here, and to us at least there appears not to be, is irrelevant. Under AEDPA, the *only* question we are asked to decide is whether the state court's determination to the contrary was *reasonable,* and it was surely that. Were we to disagree with the Arizona court's adjudication of the claim, the principles of comity and respect for the Arizona court's status as a co-equal adjudicator of constitutional issues that AEDPA reflects would require us to defer to its reasonable adjudication of the merits of the *Edwards* claim.

3

Because we decide the state court did not err when it found Clark's statement was ambiguous, the absolute bar announced in *Edwards* against resuming interrogation of a defendant who has invoked the right to counsel does not apply. Since the right to counsel was never invoked, we need not reach the issue of whether or not Clark subsequently waived that right.

C

1

Next, Clark claims that his confession was involuntary. He argues that because he was kept "for over 5 hours in a 6 by 8 foot locked, windowless room with no toilet or water facilities provides ample evidence that the statements given were involuntary." Appellant's Opening Brief, at 29. He further argues that his confession was given because detective Chambers impliedly promised that Clark would receive lenient treatment from the judge and jury. Considering the circumstances in their totality, he argues, his statements were involuntary.

The Fourteenth Amendment to the Constitution requires the suppression of statements obtained by "techniques and methods offensive to due process." *Haynes v. Washington,* 373 U.S. 503, 515, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). To be admissible, a suspect's statement must be voluntary, and in determining whether a statement was voluntary, the question is "whether the defendant's will was overborne at the time he confessed." *Id.* at 513, 83 S.Ct. 1336; *see also Amaya-Ruiz v. Stewart,* 121 F.3d 486, 494 (9th Cir.1997) (the test is "whether . . . the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne."). There is no "talismanic definition of 'voluntariness'" that is "mechanically applicable." *Schneckloth v. Bustamonte,* 412 U.S. 218, 224, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Rather, we must assess the totality of all the surrounding circumstances. *Id.* at 226, 93 S.Ct. 2041. Those circumstances include "not only the crucial element of police coercion," but also the length of the interrogation, its location, and its continuity. *Withrow v. Williams,* 507 U.S. 680, 693, 113 S.Ct. 1745, 123 L.Ed.2d

407 (1993). They may also include the failure of the police to advise the suspect of his rights, *Haynes,* 373 U.S. at 516-17, 83 S.Ct. 1336, as well as any direct or implied promises of a benefit. *Brady v. United States,* 397 U.S. 742, 753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

The duration and conditions of the detention were not coercive. Clark was detained in an interview room in the Phoenix police station for approximately eight hours. The room itself was unremarkable in its size and nature. *See United States v. D'Antoni,* 856 F.2d 975, 981 (7th Cir.1988) (finding a standard interview room eight feet by twelve feet in size not coercive). So too was the length of the detention, and the intermittent questioning. *See Jenner v. Smith,* 982 F.2d 329, 334 (8th Cir.1993) (six or seven hour questioning not coercive); *Martin v. Wainwright,* 770 F.2d 918, 927 (11th Cir.1985), *modified by* 781 F.2d 185 (1986) (five hour intermittent questioning did not render confession involuntary); *United States v. Lehman,* 468 F.2d 93, 101 (7th Cir.1972) ("vigorous" eight hour questioning with few breaks did not make confession involuntary). Clark himself testified at the pre-trial hearing that he never asked for food or water, or to use the facilities.

The conduct of the investigating detectives, for all we can tell from the record, was unimpeachable. Three separate times Clark was read his rights, and all three times Clark responded that he understood those rights. To the extent Clark now argues that his confession was given in reliance on an implied promise of favorable treatment, Detective Chambers made no such promise. Twenty minutes after Clark indicated to the detective that he wanted to continue talking, Clark asked the detective "should I be telling you or should I talk to an attorney?" In response, Detective Chambers, using his hands to illustrate

the scales of justice, expressed his *opinion* that a judge and jury would weigh fear of punishment against remorse, and that in his *opinion,* remorse would outweigh the fear of punishment. Thus, there was no promise, implied or otherwise. *See Amaya-Ruiz,* 121 F.3d at 494 (findings [sic] statements "we can forgive your lies, but the United States Court system will not forgive your lies" and "if he wants any forgiveness, he should tell the truth" not coercive). It would be strange indeed were we to hold that effective investigative tactics such as were used here amounted to a violation of due process. "There is nothing inherently wrong with efforts to create a favorable climate for confession." *Jenner,* 982 F.2d at 334 (quoting *Hawkins v. Lynaugh,* 844 F.2d 1132, 1140 (5th Cir.1988)). "[V]ery few people give incriminating statements in the absence of official action of some kind." *Schneckloth,* 412 U.S. at 224, 93 S.Ct. 2041. In sum, we agree with the Arizona court that the typical indicia of coercion are wholly absent in this record.

2

Since the Arizona court made no error in finding that Clark's confession was voluntary, it follows that there was no "clear error." *Van Tran,* 212 F.3d at 1154.

III

We conclude that the state court's determination that there was no *Miranda* violation, and that Clark's confession was voluntary, was neither contrary to nor an unreasonable application of clearly established federal law, as determined by the Supreme Court.

The judgment of the district court is hereby AFFIRMED.

STAPLETON, Circuit Judge, concurring:

I agree with my colleagues that no violation of Mr. Clark's rights under the Fifth and Fourteenth Amendments occurred. It necessarily follows that I believe the state court's resolution of Clark's claims was neither contrary to, nor an unreasonable application of, clearly established federal law. I reach my conclusions by a somewhat different route, however.

This case is difficult because Clark's statement – "I think I would like to talk to a lawyer" – reflects at least a tentative decision in favor of having a lawyer. It does not, however, indicate unequivocally that a final decision has been made.

Such a statement presents a more appealing case than did the statement in *Davis*[1] – "Maybe I should talk to a lawyer" – for a rule that the interrogating officer must provide an opportunity for reflection and seek clarification before continuing the substantive interrogation. While the *Davis* Court's interest in drawing a bright-line suggests to me that a majority of the Supreme Court would find no such duty here, a prediction on that score is unnecessary because Clark's interrogator chose to do just that: he provided an opportunity for reflection and sought clarification. Even if this case be viewed as distinguishable from *Davis,* nothing in the Supreme Court case law suggests to

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[1] *Davis v. United States,* 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

me that the interrogator's conduct here constitutes a violation of the Fifth or Fourteenth Amendment. To the contrary, the Court in *Davis,* while refusing to impose a duty to clarify in the circumstances there presented, recognized the utility of seeking clarification when uncertainty exists about the counsel issue:

> Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. That was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions.

Davis, 512 U.S. at 461, 114 S.Ct. 2350.

I would affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BILLY RUSSELL CLARK, Petitioner, vs. TIM MURPHY, Warden; ARIZONA ATTORNEY GENERAL, Respondents.	)	No. 97-560-PHX-ROS **ORDER** (Filed Aug. 01, 2000)

Petitioner Billy Russell Clark ("Petitioner" or "Clark") filed a Petition for a Writ of Habeas Corpus (the "Petition"), proceeding *pro se*. Respondents filed a Substituted Answer and Petitioner, through counsel, filed a Reply in support of his Petition. On January 27, 1998, the Magistrate Judge filed a Report and Recommendation (the "Report"), recommending that the Petition be denied, and on February 6, 1998, Petitioner filed timely Objections. Respondents filed their Response to the Objections on February 19, 1998.

Having received timely objections to the Report, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge." 28 U.S.C. § 636(b)(1). Because objections have been timely filed, the Court will give the factual findings and the legal principles *de novo* review. *Northwest Environmental Defense Center v. Army Corps of Eng'rs*, 806 F. Supp. 891 (D. Or. 1992); *cf. Barilla v. Ervin*, 886 F.2d 1514 (9th Cir. 1989) (holding that failure of parties to file timely objections to the Magistrate Judge's report relieved the trial court only of its burden to give *de novo* review to

factual findings, and did not relieve it of its obligation to review *de novo* the conclusions of law).

Background

The Magistrate Judge summarized the facts as follows. Clark was arrested, after his stepmother was reported missing and the Phoenix police learned that Clark had sold her car to a California car dealership on the day she was reported missing. Upon his arrest, Clark was read his Miranda rights. He received another Miranda warning during his interview, before he made any incriminating statements regarding the murder charge. On both occasions Clark acknowledged that he understood his rights. The first to interview Clark was detective Masino, who conducted the interview focusing on the theft of the victim's car without any discussion of the victim's murder. At 3:30 p.m., Masino introduced Clark to detective Chambers, who conducted a series of interviews with Clark throughout the day. At one point during an interview with Chambers, Clark said "I think I would like to talk to a lawyer." Chambers answered that if Clark wanted a lawyer, Chambers would call him one and their dialogue would be over. Thereafter, Chambers told Clark that he needed to talk to another witness, Clark's sister, and left Clark for thirty minutes. Prior to leaving the interrogation room, Chambers told Clark to think this over and give his answer when Chambers returned. After Chambers returned, Clark told him he did not want a lawyer. Up to that moment, Clark did not make any incriminating statements regarding the murder of his stepmother. Later during the interview, approximately a half hour after Chambers returned to the interrogation room, Clark asked Chambers: "should I be telling you or

should I talk to a lawyer?" Chambers responded by inquiring whether Clark sought his professional or personal opinion. Clark stated that he wanted Chambers' personal opinion.[1] Chambers responded that a judge and jury would weigh his fear of punishment against his remorse, and that it was Chambers' opinion that remorse should outweigh the fear of punishment. Clark then confessed to the murder, described how he killed his stepmother and disposed of her body, then led the police to the place where her body was buried. Clark was indicted on one count of first degree murder and one count of theft.

Before trial, Clark moved to suppress his confession. The motion was denied. Throughout the trial by jury, Clark insisted that he was lying when he confessed to the police. He admitted to burning and burying his stepmother's body and then stealing and selling her car, but he maintained that he did not kill her. He alleged that after coming home on the night of May 31, 1991, he discovered his stepmother's body in the hallway. Clark stated that, thinking that his father had killed her, he panicked and disposed of the body to protect his father. The jury convicted Clark of murder in the second degree and theft of property exceeding $1,500 in value. Clark was sentenced to consecutive, maximum, aggravated terms of twenty years imprisonment on murder conviction and ten years on theft.

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[1] Petitioner alleges that this fact finding by the Magistrate Judge is incorrect, that he asked Chambers for an opinion without specifying whether he wanted Chambers' professional or personal opinion. The record confirms Petitioner's version. (Answer, Exh. A at 49.) This discrepancy, however, has no bearing on the Court's analysis, as demonstrated by later discussion in this opinion.

On a timely filed appeal, Clark alleged that the trial court erred 1) in denying his motion to suppress his post-arrest statements to police because these statements were obtained after his *Miranda* rights were violated; 2) in denying his motion to suppress his post-arrest statements to police because these statements were involuntary; and 3) in considering his prior theft conviction while ruling on the motion to suppress and at sentencing. The Arizona Court of Appeals affirmed Clark's convictions and sentences, on August 31, 1995. The Arizona Supreme Court denied review on April 24, 1996. In the instant Petition Clark raises the same three issues.

Having properly concluded that Clark had exhausted his state remedies, the Magistrate Judge proceeded to consider the merits of Clark's allegations.

Discussion

On petition for a writ of habeas corpus, the district court's review is limited by the provisions of 28 U.S.C. § 2254:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light

> of the evidence presented in the State court proceeding.

28 U.S. C. § 2254(d) Further, "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254 e(1).

Miranda warnings, named after *Miranda v. Arizona*, 384 U.S. 436 (1966), must be given when officers conduct a custodial interrogation. In the case at bar, it is undisputed that Petitioner was read his Miranda rights at least twice, once before the interrogation regarding theft and the second time prior to the interrogation regarding murder. The Report concludes that Petitioner's statement "I think I would like to talk to a lawyer" constituted an unequivocal request for a lawyer, but that by agreeing to talk to detective Chambers when he returned to the interrogation room Petitioner waived that request. Both Petitioner and Respondents object to the Magistrate Judge's conclusion. Respondents contest that "I think I would like to talk to a lawyer" is not an unequivocal request for a lawyer, that federal courts differ on this issue, and that, therefore, the Arizona Court of Appeal's decision ruling that Clark's above statement did not constitute an unequivocal request for a lawyer should not be disturbed, because it was not contrary to clearly established federal law. (Resps.' Objs. at 3.)

Petitioner protests the Magistrate Judge's omission of numerous facts[2] that Petitioner deems crucial to the analysis of his Petition and "object[s] to the Magistrate Judge's analysis, or lack of analysis, of Detective Chambers' conduct after Billy Clark made his unambiguous, unequivocal request." (Pet.'s Objs. at 4.)

Petitioner argues that the Magistrate Judge having concluded that "Clark had effectively invoked his right to counsel, the next step in the analysis is to determine whether Detective Chambers 'scrupulously honored' that request for counsel. Instead of engaging in this analysis, the Magistrate Judge simply leaps to the 'waiver' issue. Petitioner argues that doing so is error." *Id.* In support of his argument, Petitioner relies on *Michigan v. Mosley*, 423 U.S. 96 (1975), where the Supreme Court held that police may question an individual after he invokes his right to remain silent only if his right to cut off questioning is "scrupulously honored." *Id.* at 100. Read in its entirety, *Mosley* is not helpful to Petitioner. Defendant there was arrested for several robberies, and invoked his right to remain silent. More than two hours later, after Miranda warnings had been given to him for the second time, another detective questioned Mosley about a murder. The responses he gave were used against him in the murder trial. The Supreme Court held that the admission of Mosley's incriminating statement did not violate the principles of *Miranda*. The issue before the Supreme Court was whether the police conduct that led to defendant's incriminating statement did in fact violate the Miranda

[2] These facts are addressed later, during the Court's discussion of the issue of voluntariness of Petitioner's confession.

guidelines, so as to render his statements inadmissible in evidence against him at his trial. *Mosley,* however, did not involve the procedures to be followed if the person in custody asks to consult with a lawyer, because the defendant in that case made no such request.[3] Thus, *Mosley* is not on point and does not support Petitioner's argument, because this Court is faced with different issues that those presented in *Mosley*.[4] The issues before the Court are, 1) whether Clark's statement "I think I would like to talk to a lawyer" was an unequivocal request for an attorney; 2) whether police conduct, after Clark made that statement, violated Clark's Miranda rights; 3) whether Clark made the incriminating statements voluntarily.[5]

1. Whether Clark's statement "I think I would like to talk to a lawyer" was an unequivocal request for an attorney.

The Magistrate Judge concluded that Petitioner's statement "I think I would like to talk to a lawyer" constituted an

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[3] The court distinguished such procedures in a footnote. *Mosley*, 423 U.S. at 100 n.7 (quoting Miranda, at 474).

[4] Petitioner is right, however, to the extent that if Petitioner's statement "I think I would like to talk to a lawyer" qualifies as an *unequivocal* request for counsel, then there was nothing to clarify and the detective's duty was to cease the interrogation immediately until counsel was present. *See Smith v. Illinois,* 469 U.S. 91, 99 (1984); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

[5] The Magistrate Judge correctly determined that Petitioner's third asserted ground for relief, i.e., that the trial court erred in considering evidence of Petitioner's prior theft conviction, when ruling on his motion to suppress and at sentencing, is not subject to review on federal habeas petition because it asserts a non-federal claim, i.e., a violation of Rule 19.2 of the Arizona Rules of Criminal Procedure. 28 U.S.C. § 2254.

unequivocal request for an attorney. (Report at 7.) The Court disagrees that Petitioner's statement qualified as unequivocal request for an attorney under clearly established federal law.

In *Davis v. United States*, 512 U.S. 452, 458-60 (1994), the Supreme Court held that "[i]nvocation of the Miranda right to counsel 'requires at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Id.* (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)).[6] Therefore, "if a suspect makes a reference to an attorney that is ambiguous or equivocal[7] in that a reasonable officer in light of the circumstances would have understood only

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[6] Prior to *Davis*, "state and federal courts developed three different approaches to a suspects's [sic] ambiguous or equivocal request for counsel: some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease." *Davis*, 512 U.S. at 456 (quoting opinion below). *See also States v. Gotay*, 844 F.2d 971, 974-75 (2d Cir. 1996) (collecting cases and noting that the Supreme Court had not, at the time, "defined ambiguity in this context or ruled on the consequences thereof"). "The trend among circuit courts that have considered the problem, however, [was] to adopt the Fifth Circuit's approach that when a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel." *Id.* (citing *United States v. Porter*, 776 F.2d 370 (1st Cir. 1985); *United States v. Riggs*, 537 F.2d 1219, 1222 (4th Cir.1976); *United States v. Cherry*, 733 F.2d 1124, 1130-31 (5th Cir. 1984); *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir.) (in banc); *United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985)).

[7] The defendant in *Davis* said: "Maybe I should talk to a lawyer." The Supreme Court's discussion does not contain any analysis of that statement but proceeds from the beginning on the premise that this statement was ambiguous.

that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* (emphasis added); *see also McNeil*, 501 U.S. 501 at 178 ("the likelihood that a suspect would wish counsel to be present is not the test for applicability of *Edwards[v. Arizona*, 451 U.S. 477 (1981)]"). The Supreme Court also stated that *Edwards* "provides the bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information . . . [I]f we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, this clarity and ease of application would be lost." *Davis*, 512 U. S. at 460 (emphasis added).

Although *Davis* stated that "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney," the Supreme Court also expressly "decline[d] to adopt a rule requiring officers to ask clarifying questions." 512 U.S. at 461. The Supreme Court summarized its holding as follows:

> To recapitulate: We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.

Id. (emphasis added). There is some guidance, though somewhat inconsistent, from the Ninth Circuit on what qualifies as unequivocal and what constitutes an equivocal request for a lawyer. In *United States v. Fouche*, 776 F.2d at 1405, the Ninth Circuit held that a suspect's statement that he *might* need a lawyer constituted an equivocal request for attorney, in *Norman v. Ducharme*, 871 F.2d 1483, 1486 (9th Cir. 1989), *cert. denied*, 494 U.S. 1031 (1990) it held that an inquiry whether the police officer thinks that the interrogated person in custody needs an attorney does not constitute even an equivocal request for a lawyer. Further, in *United States v. Ogbuehi*, 18 F.3d 807, 814 (9th Cir. 1994), the Ninth Circuit concluded that "Do I need a lawyer" or "Do you think I need a lawyer" does not rise to the level of even an equivocal request for an attorney.

> In determining whether a defendant has invoked his right to counsel, we review his words as ordinary people would understand them. If the defendant's request clearly expresses his desire to deal with the police only through counsel, then all interrogation must cease. If the desire is not clearly expressed, then further questioning must be limited to clarifying the defendant's intention. The agents at this point must not coerce or intimidate the suspect into waiving his rights. While we have held that a suspect saying that he "might want to talk to a lawyer" is an equivocal request, we have also said that asking "if he should see a lawyer" does not "rise to the level of an equivocal request for counsel." We have stated, without deciding, that "Should I call my lawyer?" "might not even constitute an equivocal invocation, and thus might require no clarification by the interrogating officers."

Id. at 814 (citations and internal quotation marks omitted). Although *Davis* changes the procedure to be applied upon the suspect's equivocal statements described in *Ogbuehi*, it does not change the Ninth Circuit's opinions on what statements qualify as unequivocal, equivocal and/or not even equivocal.[8] Thus, an unequivocal request for an attorney must be one which "clearly expresses [a suspect's] desire to deal with the police only through counsel." *Id.* A statement which may be understood as the interrogated person saying he might need a lawyer, is at best, equivocal. *Id.*

In the recent decision of *Burket v. Angelone*, 208 F.3d 172 (4th Cir. Mar. 27, 2000), the Fourth Circuit analyzed, under *Davis*, a statement similar to the one made by Petitioner and concluded that by stating "I think I need a lawyer" a suspect did not unequivocally invoke his right to counsel. "This statement does not constitute an unequivocal

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[8] Also the Supreme Court of Arizona, in *State v. Eastlack*, 883 P.2d 999 (Ariz. 1994), following *Davis*, concluded that a suspect's statement "I think I better talk to a lawyer first," was sufficiently equivocal to permit the police officer to continue the interrogation. *Id.* at 1007. The court stated: "[d]efendant had demonstrated the capacity to express himself clearly, in English, and could have unequivocally requested a lawyer, had he wished to. Moreover, defendant had substantial prior experience with law enforcement officials and was familiar with police interrogation. Under these circumstances, a trial judge could properly conclude that a reasonable police officer would not have understood [defendant]'s statement to be a request for counsel." *Id.* at 1006. Under those circumstances, Arizona Supreme Court held that "questioning of defendant . . . was entirely proper and was squarely within the boundaries set by both the majority opinion and the concurrence in *Davis*." *Id.* Thus, *Eastlack* indicated that the standard for what constitutes unequivocal versus equivocal statement is the same under both Arizona and federal law.

request for counsel. In fact, [this] statement is quite similar to the defendant's statement in *Davis* ("Maybe I should talk to a lawyer"), which the Supreme Court found ambiguous." *Id.* at 197 (relying on *Davis v. United States*, 512 U.S. 452, 458-60 (1994); and *Edwards v. Arizona*, 451 U.S. 477 (1981)).

There are other cases decided after *Davis*, which reach the same conclusion, i.e., that where a suspect makes an equivocal statement about consulting an attorney, i.e., one that indicates that a suspect is considering the possibility of consulting an attorney but does not clearly state that he requests one, there has been no invocation of the right to counsel under *Miranda* as interpreted by *Davis*. *See e.g.*, *Diaz v. Senkowski*, 76 F.3d 61, 65 (2d Cir. 1996) ("Do you think I need a lawyer?" not unambiguous);[9] *Lord v. Duckworth*, 29 F.3d 1216, 1220-21 (7th Cir. 1994) ("I can't afford a lawyer but is there any way I can get one?" not an unambiguous request); *see also*, *United States v. Doe*, 60 F.3d 544, 546 (9th Cir. 1995) (mother's statement that maybe the suspect should see a lawyer not unambiguous); *Flamer v. State of Delaware*, 68 F.3d 710, 725 (3d Cir. 1995) (suspect's request to call his mother about possible representation by a lawyer not unambiguous), *cert. denied*, 516 U.S. 1077 (1996); *Kight v. Singletary*, 50 F.3d 1539,

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[9] In Diaz, the conversation with police officer was as follows:

Diaz: I think I want a lawyer.

Powell: What?

Diaz: Do you think I need a lawyer?

Powell: You have been advised of your rights.

Diaz, 76 F.3d at 65.

1548 (11th Cir. 1995) (suspect who said he did not want to talk to the officer did not invoke his right to counsel), *cert. denied*, 516 U.S. 1077 (1996); *cf. United States v. McKinley*, 84 F.3d 904, 908 (7th Cir. 1996) (defendant's attorney's request that defendant not be interrogated for the duration of an unrelated proceeding was not an unequivocal request for counsel).

In the Report here, the Magistrate Judge states that he is not aware of any "federal court opinions holding a defendant's request to be equivocal simply because the request was prefaced by the phrase, "I think" (Report at 11.) However, in *United States v. McLaren*, 38 M.J. 112, 115 (A.C.M.R. 1993), *cert. denied*, 510 U.S. 1112 (1994) the court held that "the words, "I think," used by appellant in this case, as in "I think I want a lawyer" and "I think I need to talk to a lawyer" could render a request for counsel equivocal. *Id.*[10] In the case at bar, Petitioner used more tentative language than the *McLaren* defendant. Petitioner said: "I think I would like to talk to a lawyer."

In light of *Davis*'s clear pronouncement that an equivocal statement does not require an immediate cessation of questioning, and under the Ninth Circuit's holding in *Fouche*, that a suspect's statement that he *might* need a lawyer constitutes an equivocal request, *see* 776 F.2d at 1405, and because the statements in those cases are virtually indistinguishable from Petitioner's statement, the Court holds that the Arizona Court of Appeals' finding, that Petitioner's statement "I think I would like to talk to

[10] The court also stated that using the phrase "I think" is not in itself dispositive. *Id.*

a lawyer" was not an unequivocal request for attorney, was not contrary to clearly established federal law. 28 U.S.C. § 22254(d)(1). Therefore, the Court rejects the part of the Magistrate Judge's Report finding to the contrary.

In light of the above discussion, it is also clear that Petitioner's question asked later during the interview with Chambers: "should I be telling you or should I talk to a lawyer?" did not constitute an unequivocal request for counsel, and *Norman v. Ducharme* as well as the more recent *Ogbuehi* suggest that it probably did not constitute even an equivocal request. Petitioner's confession happened after his question, "should I be telling you or should I talk to a lawyer?" directed by Petitioner to Chambers and after the ensuing conversation summarized previously.[11]

2. Whether police conduct, after Petitioner said "I think I would like to talk to a lawyer," violated his Miranda rights.

Because Clark did not unequivocally invoke the right to counsel, the absolute bar announced in *Edwards* against resuming interrogation of a defendant who has invoked the right to counsel does not apply. Consequently, because Petitioner's Miranda right to counsel was not invoked, it was not violated. The Arizona courts' rejection

[11] That Petitioner asked some twenty minutes into a conversation, after Chambers returned to the interrogation room, "should I be telling you or should I talk to a lawyer," further confirms that his initial statement was not an unequivocal request but more of a tentative expression of a possibility he was considering, without deciding it, at that time. At the time of the second statement, he was still undecided.

of Petitioner's claims was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1).[12]

3. Whether Petitioner made the incriminating statements voluntarily.

In deciding the question of voluntariness, the United States Supreme Court has directed courts to consider "the totality of circumstances." *Withrow v. Williams*, 507 U.S. 680, 693-694 (1993); *Haynes v. Washington*, 83 S. Ct. 1336, 1343 (1963). Relevant are "the crucial element of police coercion; the length of the interrogation; its location; its continuity" as well as "the defendant's maturity; education; physical condition; and mental health." *Withrow v. Williams*, 507 U.S. at 693-694. In other words, the question to address

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[12] In his Reply in Support of Petition, Petitioner states: "Of course, the conclusion that 'I think I want an attorney,' or words to that effect, have been held as a clear, unequivocal invocation of the right to counsel in a long line of state cases." (Rpl. at 7.) In support of this contention Petitioner cites several cases from various state courts. However, the opposite is also true, with numerous cases holding to the contrary, in addition to the already discussed *Eastlack*, see note 9, above. *See, e.g.*, *Daniel v. State*, 644 P.2d 172 (Wyo. 1982) (defendant's statement that he "probably like to have an attorney present" held not unequivocal); *Waterhouse v. State*, 429 So.2d 301, 305 (Fla.), *cert. denied*, 464 U.S. 977 (1983) (defendant's "statements that he thought he should talk to an attorney were at most equivocal requests to consult with counsel"); *State v. Travis*, 545 P.2d 986 (Ariz. 1976) (I think I might need an attorney" not unequivocal and "I think I want to talk to an attorney before I say anything else" held equivocal). Notwithstanding, this split of authority among state courts is of no consequence here, because the standard of review to be applied by this Court involves only "Federal Law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

is did the government's conduct overbear the defendant's free will? *Haynes v. Washington*, 373 U.S. at 513-14. The coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the due process clause. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

Petitioner's objection to the Magistrate Judge's resolution of the question of voluntariness reads in its entirety:

> The fact remains that the trial court in this case did not engage in any fact finding concerning whether Billy Clark's confession was voluntary under the totality of the circumstances. The Magistrate Judge urges this Court to merely adopt the findings of the Arizona Court of Appeals on this issue. The Arizona Court of Appeals was not engaged in rendering factual findings but merely engaged in a legal analysis based on the factual determination of the trial court. This Court is not bound by the analysis of the Arizona Court of Appeals. Petitioner respectfully requests that this Court consider his arguments on whether the statements made were involuntary based on the 'totality of the circumstances' as outlined in the pleadings before the Court.

(Pet.'s Objections at 9.) First, Petitioner does not cite any authority for his proposition that the Court is not bound by the analysis of the Arizona Court of Appeals. Respondents are correct in pointing out that 28 U.S.C. § 2254(d) stands in direct opposition to Plaintiff's argument. Unless the state court based its analysis on an unreasonable determination of facts or an unreasonable application of clearly established federal law, the federal court is bound by the state court's factual determinations. *Id.* Reviewing the record before it, the Arizona Court of Appeals rejected

Petitioner's argument that his confession was involuntary, affirming the trial court's finding that the interview was not conducted in coercive circumstances. Second, the argument in support of the "totality of the circumstances" allegation that the confession was involuntary amounts to a recitation of the facts which Petitioner alleges the Magistrate Judge failed to consider. (Rpl. at 10.) Specifically, Petitioner alleges that his confession was involuntary because:

> 1. The interrogation took place in an 8' x 10' room without bathroom or drinking facilities;[13]
>
> 2. The interrogation lasted over six hours;
>
> 3. Although Miranda warnings were given, they were never honored, despite [Petitioner]'s requests;
>
> 4. There was a promise by Detective Chambers that [Petitioner] would benefit at trial if he made statements;
>
> 5. [Petitioner]'s attempts to invoke this [sic] right to counsel was [sic] ignored and/or redirected in such manner as to change his mind in reliance on a possible benefit at trial which could be derived by confessing.

(Rpl. at 10.)

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[13] In his Objections Petitioner alleged that the interrogation room measured "6 foot by 8 foot." (Pet.'s Obj. at 2.) In light of the Court's discussion, this inconsistency is irrelevant for the purposes of deciding the Petition.

In his Objections to the Report, Petitioner also lists the facts which were allegedly omitted from the Report and which Petitioner wants the Court to consider. Among these facts are: the small size of the interrogation room, the length of the interviews, and that Clark was handcuffed when Chambers left the room.

It is unclear how conducting an interrogation in a larger room equipped with a toilet and sink would have changed Clark's circumstances. Clark does not allege that the facility was so cramped that he was placed under pressure or that he was denied water or bathroom facilities when he needed them and the record confirms that he had access to both. Initially, in the Reply in support of his Petition, Petitioner alleged that he "was in an interrogation room for five and a half hours without food or water before any incriminating statements were made." (Rpl. at 10.) In their Objections to the Report Respondents state that "the record is clear that Petitioner was allowed to use restroom facilities and furnished with a drink. (Answer, Exhibit A at 11, 37)." (Respondents' Objections at 6.) Respondents' citation to the record is incorrect. Neither page 11 nor 37 of Exhibit A to their Answer to the Petition, which is a transcript of the suppression hearing, contains any reference to the Petitioner's use of bathroom facilities or drinks. The record does reflect, however, that Petitioner was not denied bathroom facilities or drinks, that detective Masino brought him a soda, and that detectives bought food for Petitioner when they were buying it for themselves during their travel to the place where Petitioner was to show them where he admittedly buried his stepmother. (Answer, Exh. A at 19, 54, 55, 117.) The record further reflects that Petitioner made no requests to use the restroom until he left the interrogation room to lead

the police to where he buried his stepmother. (*Id.*) As the Arizona Court of Appeals correctly stated, "the record is devoid of evidence that [Petitioner] made any unheaded [sic] requests for either water or the use of a toilet." (Answer, Exh. C at 11.) Further, Clark was brought to the station at about noon and was there till approximately 8 p.m., but he spent most of the time waiting in the interrogation room rather than being interviewed. (Answer, Exh. A, passim.) Finally, while he was handcuffed when he was brought to the interrogation room, according to Petitioner's own testimony, detective Masino removed the handcuffs when he entered the room for the first interview and Petitioner was not handcuffed during the interrogation or, at least, he did not recall being handcuffed.[14] (Answer, Exh. A at 122.) Thus, the omitted facts do not support Petitioner's allegation that his confession was involuntary because – taken together – they do not establish a coercive environment.

Further, Petitioner's allegation that detective Chambers made a promise that Petitioner would benefit at trial if he made self-incriminating statements finds no support in the record. By Petitioner's own admission, he asked for the detective's *opinion* on whether he "should [ ] be telling [Chambers] or should [he] talk to a lawyer." In response, Chambers, using his hands to illustrate the scales of justice, expressed his opinion that a judge and jury would weigh Petitioner's fear of punishment against his remorse and that, in Chambers' opinion, the remorse should

[14] That Petitioner does not recall whether he was handcuffed indicates that he did not feel uncomfortable even if he was handcuffed at times.

outweigh the fear of punishment. (Answer, Exh. A at 49, 115). During the suppression hearing, the following colloquy took place between Petitioner and his counsel:

> Q. Billy, did you listen to detective Chambers when he talked about how important remorse was?
>
> A. Yes, I did.
>
> Q. Did that have any impact on you?
>
> A. In the sense that it was taken into consideration and that I believed what he was saying. I believed that a confession would in fact help me out later on, rather than the police finding information on their own, which detective Chambers told me it was probably just a matter of time before they did so. In fact I think he said probably by tomorrow we'll know everything.

(Answer, Exh. A at 118.) Thus, Chambers did not promise Petitioner anything to coerce him to confess to a crime he did not commit. Rather, Chambers provided his opinion, in which he considered and decided that it was better for Petitioner to confess before the police discover all the information on their own. Petitioner then said: "Well, let's talk about it then," (Answer, Exh. A at 50), and proceeded to confess. *Id.* Taking all the evidence relevant to voluntariness into consideration, the Court agrees with the Arizona Court of Appeals that "the typical indicia of coercion are absent in this record." (Answer, Exh. C at 12.)

Finally, Petitioner's claim that his confession was involuntary, appears to be predicated in large measure on Petitioner's assertion that his Miranda rights were violated after he allegedly invoked his right to counsel. The Court has decided that no violation occurred. Consequently,

Petitioner's claim that his confession was involuntary must fail.

In light of the above discussion, the Court will adopt in part and reject in part the Magistrate Judge's Report and Recommendation, as fully explained in this Order.

Accordingly,

IT IS ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Doc. #1) is denied.

DATED this 31 day of June, 2000.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

Cc. All counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BILLY RUSSELL CLARK, Petitioner, v. TIM MURPHY, etc., et al., Respondents.	)	CIV 97-560 PHX ROS (SLV) REPORT AND RECOMMENDATION (Filed Jan. 27, 1998)

TO THE HONORABLE ROSLYN O. SILVER:

Billy Russell Clark, presently incarcerated in the Arizona State Prison Complex at Florence, Arizona, filed a pro per Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Respondents filed a Substituted Answer to Petition for Writ of Habeas Corpus and Clark, through counsel, filed a Reply in Support of Petition for Writ of Habeas Corpus.

1. **Factual and procedural history**

On May 15, 1991, Cynthia Tomecko reported to Phoenix police that her mother, Anita Clark, was missing. Police focused their attention on Clark, Anita Clark's stepson, when they learned that he had sold her automobile to a California automobile dealership on the day she was reported missing. Answer to Petition for Writ of Habeas Corpus, Exhibit [Exhibit] C.

Following his arrest at 11:00 a.m., Clark spent the balance of the day in an interview room at the Phoenix Police Department headquarters. *Id.* at 3. Clark was read his *Miranda* rights upon his arrest and again during his

interview before he made any incriminating statements regarding the murder accusation. On both occasions, he stated that he understood his rights. *Id.* at 3-4. Detective Charles Masino was the first officer to interview Clark. This interview began shortly after noon, focused only on the theft of the victim's car, and did not include any discussion of the victim's murder. At approximately, 3:30 p.m., Masino introduced Clark to Detective Michael Chambers, who began a series of interviews with Clark that continued into the evening hours. *Id.* at 4.

During his interview with Chambers, Clark stated at one point, "I think I would like to talk to a lawyer." *Id.*; Exhibit A, p. 45. At this point, Detective Chambers told Clark that if he wanted a lawyer, Chambers would call him one and their dialogue would be over. Chambers then told Clark that his sister Margaret was at the station and Chambers wanted to talk to her. He told Clark that he was going to leave him alone for a few minutes to make a decision and that when he returned he would expect his answer. Exhibit A, p. 45. Chambers returned 30 minutes later and Clark told him that he didn't want a lawyer. Up to that point, Clark had not made any incriminating statements regarding the murder. As the interview progressed, Clark asked Chambers whether it would be better for him to talk to a lawyer or Chambers. Exhibit C, p. 4. Chambers asked Clark if he was seeking Chambers' personal opinion or his professional opinion. When Clark said that he wanted Chambers' personal opinion, Chambers told him that a judge and jury would weigh his fear of punishment against his remorse, and that it was Chambers' opinion that remorse should outweigh the fear of punishment. Clark then confessed to the murder. *Id.* at 4-5.

A grand jury indicted Clark on one count of first degree murder and one count of theft. *Id.* at 2.

Before trial, Clark moved to suppress his confession. Exhibit B. The trial court denied the motion to suppress, *id. at 2-3,* and the case proceeded to trial by jury, during which Clark maintained that he was lying when he confessed to police. He admitted burning and burying the victim's body, and then stealing and selling her automobile, but claimed that he did not kill her. Instead, he asserted that he came home on the night of May 13, 1991, and discovered his stepmother's dead body in the hallway. Surmising that his father had killed her, he "panicked" and disposed of the body to protect his father. *Exhibit C, p. 2.*

The jury convicted Clark of murder in the second degree and theft of property exceeding $1,500 in value. The trial court sentenced Clark to consecutive, maximum, aggravated terms of twenty years imprisonment on the murder conviction and ten years imprisonment on the theft conviction. *Id.*

Clark filed a timely direct appeal, raising three separate issues:

1. Whether the trial court erred in denying his motion to suppress his post-arrest statements to police because his Miranda rights were violated.

2. Whether the trial court erred in denying his motion to suppress his post-arrest statements to police on the grounds that they were involuntary.

3. Whether the trial court erred in considering evidence of his prior theft conviction in ruling on the motion to suppress and at sentencing. *Id.* at 3.

The Arizona Court of Appeals affirmed Clark's convictions and sentences in a Memorandum Decision filed on August 31, 1995. *Id.* The Arizona Supreme Court denied review on April 24, 1996. Exhibit D.

Clark filed the instant Petition for Writ of Habeas Corpus on March 19, 1997, raising the same three grounds for relief.

2. Evidence of credibility claim

Clark's third ground for relief is based upon his assertion that the trial court, by considering information which came to its attention, not as a result of an evidentiary hearing, but from documents attached to a legal brief[1], effectively deprived him of the right to be present at all critical phases of the prosecution, in violation of Rule 19.2 of the Arizona Rules of Criminal Procedure.[2]

A state prisoner is entitled to habeas relief under 28 U.S.C. § 2254 only if he is held in custody in violation of the Constitution, laws or treaties of the United States. *Engle v. Isaac,* 456 U.S. 107, 119, 102 S.Ct. 1558, 1567, 71 L.Ed.2d 783 (1982); *Gutierrez v. Griggs,* 695 F.2d 1195, 1197 (9th Cir. 1983). Federal habeas relief is not available for alleged errors in the interpretation or application of state law. *Estelle v. McGuire,* ___ U.S. ___, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991); *Middleton v. Cupp,* 768 F.2d

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[1] These documents indicated that *Clark* had entered a no-contest plea to a theft charge, contrary to his representation to the court, under oath, that he had a completely clean record.

[2] 17 A.R.S., Rules of Crim.Proc., Rule 19.2 provides: "the defendant has the right to be present at every stage of the trial . . . "

1083, 1085 (9th Cir. 1985), *cert. denied,* 478 U.S. 1021 (1986). Nor is it available when a petitioner merely alleges that something in the state proceedings was contrary to general notions of fairness, unless the Constitution or other federal law specifically protects against the alleged unfairness or guarantees the procedural right in state courts. *Id.*

Because no federal right is implicated, Clark's state law claim is not cognizable in a federal habeas proceeding. We need not even discuss whether Clark has procedurally defaulted on his claim in state court, for when a state prisoner has alleged no deprivation of federal rights, § 2254 does not apply and it is unnecessary for the court to determine whether the prisoner preserved his claim in the state courts. *Engle v. Isaac* at 120 n.19, 102 S.Ct. at 1567 n.19; *Gutierrez v. Griggs* at 1197-98.

3. Exhaustion of remedies

Until the recent amendments to 28 U.S.C. § 2254, enacted in the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104-132, 110 Stat. 1218 (1996), a state prisoner must have exhausted, in state court, every federal claim raised in the petition, before a federal district court could consider the prisoner's application for relief under 28 U.S.C. § 2254. *See Coleman v. Thompson,* 501 U.S. 722, 111 S.Ct. 2546, 2554-55 (1991); *Castille v. Peoples,* 489 U.S. 346, 349, 109 S.Ct. 1056, 1059 (1989); *Rose v. Lundy,* 455 U.S. 509, 518-19, 102 S.Ct. 1198, 1203-04 (1982).

As recently amended however, 28 U.S.C. § 2254(b(2) provides that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure

of the applicant to exhaust the remedies available in the courts of the State."

To properly exhaust state remedies, the prisoner must have afforded the state's highest court the opportunity to rule upon the merits of each federal constitutional claim by "fairly presenting" the claim to the state's highest court in a procedurally correct manner. *Castille,* 489 U.S. at 351, 109 S.Ct. at 1060; *Kim v. Villalobos,* 799 F.2d 1317, 1319 (9th Cir. 1986).

To comply with this requirement, an Arizona prisoner must present his claims in a petition for review by the Arizona Supreme Court, either on direct appeal or in a petition for post-conviction relief, before he can present her [sic] claims in a federal habeas corpus petition. *See 17 A.R.S.* Rules of Crim.Proc., Rule 31.19 (direct appeal); 17 A.R.S. Rules of Crim.Proc., Rule 32.9(c) (post-conviction relief); *Jennison v. Goldsmith,* 940 F.2d 1308, 1310-11 (9th Cir. 1991) (per curiam).

Clark has properly exhausted his claim of *a Miranda* violation and his claim that his confession was involuntary and we may therefore reach the merits of both.

4. Standard of Review

28 U.S.C. § 2254(d)(1), as amended by the AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The AEDPA limits the ability of federal courts to reexamine questions of law and mixed questions of law and fact. *Jeffries v. Wood,* 114 F.3d 1484, 1498 (9th Cir. 1997). Historically, federal courts have reviewed all questions of law and mixed questions of law and fact *de novo. Id.* Under § 2254, as amended, federal courts must restrict their legal analysis to whether the state decision was contrary to or an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* Nonetheless, state court conclusions of law, addressed by section 2254(d)(1), should be examined *de novo. Id.* at 1500; *accord, Lindh v. Murphy, 96* F.3d 856, 869 (7th Cir. 1996).

5. <u>Miranda violation</u>

A. Clark's request for counsel was unequivocal

Clark claims that his *Miranda* rights were violated when he told the police, during his custodial interrogation, that "I think I'd like to talk to a lawyer" and later asked the interrogating officer, "Should I be telling you or should I talk to a lawyer?"

The trial court found Clark's statement "I think I would like to talk to a lawyer" to be equivocal or ambiguous enough

to allow the police to attempt to clarify whether or not Clark wished to cease the questioning and speak to an attorney. The trial court also found that upon returning to the interrogation room, Detective Chambers said nothing to Clark, and that it was Clark who made the first statement, which was that he did not want a lawyer and that he wanted to continue talking.

The trial court found that Clark's later question to Chambers, "should I be telling you or should I talk to a lawyer?" did not constitute an invocation of the right to counsel.

The court of appeals affirmed Clark's convictions, agreeing with the trial court that Clark's statement, "I think I would like to talk to a lawyer", was "sufficiently equivocal to render the statement ambiguous". In reaching this conclusion, the court of appeals relied upon an opinion of the Arizona Supreme Court, rendered in *State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999, 1006 (1994), that a defendant's statement during interrogation, "I think I better talk to a lawyer first," was not a clear request for counsel.

Miranda v. Arizona, 384 U.S. 486, 86 S.Ct. 1602 (1966) sets forth a "'rigid' prophylactic rule, *Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2560, 2569, 61 L.Ed.2d 197 (1979)*", embodying two distinct inquiries. *Smith v. Illinois,* 469 U.S. 91, 95, 105 S.Ct. 490, 492 (1984). First, courts must determine whether the accused actually invoked his right to counsel. *Id.* Second, if it was so invoked, courts may admit his responses to further questioning only upon finding that the accused (a) initiated further discussions with the police and (b) knowingly

and intelligently waived the right he had invoked. *Id.*, 105 S.Ct. at 493.

An accused in custody, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona,* 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1885 (1981). "*Edwards* sets forth a 'bright-line' rule that all questioning must cease after an accused requests counsel." *Smith v. Illinois,* 469 U.S. at 98, 105 S.Ct. at 494.

The Court in *Smith* specifically declined to "decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or equivocal as a result of events preceding the request *or of nuances inherent in the request itself . . .* " *Id.* at 100, 105 S.Ct. at 495 (emphasis added); but the Court in *Davis v. United States*, 512 U.S. ___, 114 S.Ct. 2350 (1993) was not so reticent:

> The applicability of the " 'rigid' prophylactic rule" of *Edwards* requires courts to "determine whether the accused *actually invoked* his right to counsel." (Citation omitted) . To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. (Citation omitted). Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." (Citation omitted). But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only

> that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. (Citations omitted).
>
> Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." (Citation omitted). Although a suspect need not "speak with the discrimination of an Oxford don," *post*, at 2364 (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

Id. at 2355 (Emphasis in original).

Courts must give a broad, rather than narrow, interpretation to defendants' requests for counsel. *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S.Ct. 1404, 1409 (1986), but interpretation is only required when the defendant's words, "understood as ordinary people would understand them," are ambiguous. *Connecticut v. Barrett*, 479 U.S. 253, 529, 107 S.Ct. 828, 832 (1987).

This case bears a remarkable factual resemblance to that of *Smith v. Endell,* 860 F.2d 1528, (9th Cir. 1988).

In *Smith,* the defendant was arrested for possession of cocaine and questioned by state troopers. He was advised of his *Miranda* rights and waived them. After talking to the troopers for approximately an hour, admitting that he distributed cocaine for Ron Cole and that he owed Cole $15,000, a trooper asked Smith if he shot Cole. Smith

made the following request: "Can I talk to a lawyer? At this point I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?" The troopers persisted in their interaction with Smith, who then made a second statement regarding representation by counsel, saying "I don't know if I need one or not. That's why I'm trying to make my mind up, if I need to go that route for myself, you know." *Id.* at 1529-30.

The superior court denied Smith's motion to suppress, holding that in his two references to a lawyer, Smith was merely "underscoring the fact that he has a right to counsel. . . . He's undecided whether he needs one . . . " The Alaska Court of Appeals affirmed, stating that Smith's first reference to having an attorney "simply indicated that Smith was aware that he had a right to counsel;" and that his second reference "indicat[ed] he was trying to decide whether to contact an attorney, but continued the interviews." *Id.* at 1530.

The United States Magistrate recommended denial of Smith's petition for habeas corpus. The magistrate recognized that *Smith v. Illinois* barred the use of Smith's second reference to counsel to cast doubt on his first request, but characterized Smith's first statement, as "conditional, and therefore "ambiguous". *Id.* The district court adopted the magistrate's recommendation and dismissed the petition. *Id.* at 1531.

The Ninth Circuit reversed. The court held that the request was not ambiguous and that the troopers could not have mistaken Smith's meaning.

Clark's request did not contain words of equivocation such as "might" or "maybe" or "perhaps". Court decisions have turned on the absence of such language. *Compare*

Smith, supra,; Robinson v. Borg, 918 F.2d 1387, 1391 (1990) (holding statement "I have to get me a good lawyer, man. Can I make a phone call?" constituted an unequivocal request for counsel), *with Davis,* 512 U.S. ___, 114 S.Ct. at 2353 (holding "Maybe I should talk to a lawyer." is equivocal); *Robtoy v. Kincheloe,* 871 F.2d 1478, 1482 (holding "Maybe I should call my attorney" to be equivocal).

Nor am I aware of any federal court opinions holding a defendant's request to be equivocal, simply because the request was prefaced by the phrase, "I think". *See, e.g., Shedelbower v. Estelle,* 885 F.2d 570, 573 (9th Cir. 1989) (treating defendant's statement, "You know, I'm scared now. I think I should call an attorney" as an invocation of his right to counsel.); *Cannady v. Dugger,* 931 F.2d 752, 755 (11th Cir. 1991) (holding "I think I should call my lawyer" was an unequivocal request for counsel). Softening a request for counsel in the face of authority, by prefacing the request with "I think", is a far cry from asking the interrogating officers their opinion. *See,* e.g., *United States v. March,* 999 F.2d 456, 460 (10th Cir. 1993) (holding question "Do you think I need an attorney?" did not constitute an unequivocal request for one).

Clark's first request for counsel was unambiguous and unequivocal. There is no way a reasonable police officer could have mistaken his intent. Although the *Davis* Court saw no reason to disturb the conclusion of the lower courts that Davis' remark, "Maybe I should talk to a lawyer" was not a request for counsel, this court is hard-pressed to believe that the high court would be equally sanguineous with Clark's unambiguous statement, "I think I would like to talk to a lawyer."

To hold Clark's request to have been ambiguous *is* to require the suspect "to speak with the discrimination of an Oxford don" and is simply an unreasonable application of federal law as determined by the Supreme Court of the United States.

B. Waiver of right invoked

Once Clark made his unequivocal request for counsel, interrogation could only continue, under the reasoning of *Smith v. Illinois,* if Clark both (1) initiated further discussions with the police and knowingly and (2) intelligently waived the right he had invoked. *Id.,* 105 S.Ct. at 493. Clark satisfied the former requirement, by initiating the conversation upon the return of Detective Chambers. The fact that he intelligently waived this right is apparent in the record. Clark had been read his *Miranda* rights on two previous occasions – first upon his arrest, and a second time, at the beginning of his interrogation. There is no question that he understood his right to have an attorney present during any further questioning. When Clark made his first request for counsel, Detective Chambers specifically told him that if he wanted a lawyer, Chambers would call him one. Clark intelligently waived the right he had invoked.

Finally, I agree entirely with both the trial court and the Arizona Court of Appeals, that Clark's later question of Detective Chambers, as to whether or not he should speak to a lawyer did not constitute an unequivocal request for counsel.

6. Voluntariness of confession

Clark's claim that his confession was involuntary is nominally based on the "totality of the circumstances", but it is dependant in large part on his continuing claim that his *Miranda* rights were violated. It is my opinion, however, as noted above, that Clark waived those rights.

Furthermore, the Arizona Court of Appeals carefully analyzed the custodial setting in which police questioned Clark, and found that it was not so coercive as to overbear his will and exact an involuntary confession. This is neither an unreasonable determination of the facts, nor does it involve an unreasonable application of clearly established federal law as set forth by the United States Supreme Court. This court is therefore precluded, pursuant to 28 U.S.C. § 2254(d)(1), from granting habeas relief on this claim.

7. Conclusion

I find that Clark's first request for counsel was unequivocal under clearly established federal law, as determined by the Supreme Court of the United States, and that the determination by the Arizona State Court of Appeals to the contrary, involved an unreasonable application of that law. Nonetheless, I believe that Clark validly waived the right to counsel, previously invoked, and that there was consequently no violation of his *Miranda* rights.

I find that the conclusion reached by the Arizona Court of Appeals, that Clark's confession was voluntary, did not involve an unreasonable determination of the facts, or an unreasonable application of clearly established federal law as determined by the Supreme Court of the

United States and that habeas relief is therefore precluded on the basis of this claim.

Finally, Clark's remaining claim, that the trial court violated the Arizona Rules of Criminal Procedure, does not raise a federal claim cognizable in this action.

IT IS THEREFORE RECOMMENDED that the Petition for Writ of Habeas Corpus be **denied.**

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge.

DATED this 21 day of January, 1998.

/s/ Stephen L. Verkamp
Stephen L. Verkamp
United States Magistrate Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. BILLY RUSSELL CLARK, Appellant.	)	1 CA-CR 93-0382 DEPARTMENT D MEMORANDUM DECISION (Not for Publication, Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause No. CR 91-04272

The Honorable Frank T. Galati, Judge

AFFIRMED

(Filed Aug. 31, 1995)

Grant Woods, Attorney General

by Paul J. McMurdie, Chief Counsel
Criminal Appeals Section
and
John Pressley Todd
Assistant Attorney General
Attorneys for Appellee — Phoenix

James M. Jellison — Phoenix
Attorney for Appellant

WEISBERG, Judge

Bill Russell Clark ("defendant") appeals his convictions and sentences for murder in the second degree and theft. For the following reasons, we affirm.

FACTUAL[1] AND PROCEDURAL BACKGROUND

On May 15, 1991, Cynthia Tomecko reported to Phoenix police that her mother, Anita Clark, was missing. Police focused their attention on defendant, Anita Clark's stepson, when they learned that he had sold her automobile to a California automobile dealership on the day she was reported missing. During a postarrest interview, defendant confessed to killing his stepmother. He then led the police to where he had burned and buried the victim's body.

A grand jury indicted defendant on one count of first degree murder and one count of theft. The case proceeded to a trial by jury, during which defendant maintained that he was lying when he confessed to police. He admitted burning and burying the victim's body, and then stealing and selling her automobile, but claimed that he did not kill her. Instead, he asserted that he came home on the night of May 13, 1991, and discovered his stepmother's dead body in the hallway. Surmising that his father had killed her, he "panicked" and disposed of the body to protect his father.

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[1] The facts are viewed in a light most favorable to sustaining the judgment with all reasonable inferences resolved against the defendant. *State v. Atwood*, 171 Ariz. 576, 596, 832 P.2d 593, 613 (1992), *cert. denied*, 113 S. Ct. 1058 (1993).

The jury convicted defendant of murder in the second degree and theft of property exceeding $1,500 in value. The court sentenced defendant to consecutive, maximum, aggravated terms of twenty years imprisonment on the murder conviction and ten years imprisonment on the theft conviction.

Defendant timely appealed. This court has jurisdiction pursuant to Ariz. Rev. Stat. Ann. ("A.R.S.") sections 12-120.21 (A), 13-4031, and 13-4033.

ISSUES PRESENTED

1. Whether defendant's post-arrest statements to police were voluntary; and
2. Whether the trial court erred in considering evidence of defendant's prior theft conviction in ruling on the motion to suppress and at sentencing.

DISCUSSION

A. The trial court did not err in finding that defendant's post-arrest statements were voluntary.

Defendant assigns error to the trial court's decision to admit evidence of his post-arrest confession to police. He argues that the confession was involuntary because of (i) his unheeded requests for counsel, and (ii) police coercion that overbore his will to assert his *Miranda*[2] rights.

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Confessions are *prima facie* involuntary and the state has the burden of showing their voluntariness by a preponderance of the evidence. *State v. Lopez,* 174 Ariz. 131, 137, 847 P.2d 1078, 1084 (1992), *cert. denied,* 114 S. Ct. 258 (1993). "A trial court's ruling on the admissibility of a confession will not be reversed on appeal unless there has been clear and manifest error." *State v. Eastlack,* 180 Ariz 243, 251, 883 P.2d 999, 1007 (1994).

Following his arrest at 11:00 a.m., defendant spent the balance of the day in an interview room at the Phoenix Police Department headquarters. Defendant was read his *Miranda* rights upon his arrest and again during his interview before he made any incriminating statements regarding the murder accusation. On both occasions, defendant stated that he understood his rights.

Detective Charles Masino was the first officer to interview defendant. This interview began shortly after noon, focused only on the theft of the victim's car, and did not include any discussion of the victim's murder. At approximately 3:30 p.m., Masino introduced defendant to Detective Michael Chambers, who began a series of interviews with defendant that continued into the evening hours, at which time defendant confessed to killing Anita Clark.

During his interview with Chambers, defendant stated at one point, "I think I would like to talk to a lawyer." Chambers understood this statement to mean that defendant could not decide whether to continue talking or to terminate the interview and speak with an attorney. Chambers therefore ceased questioning defendant and, before leaving the interview room, told defendant that (i) he must decide whether he wanted to talk to

an attorney, (ii) if he did, Chambers would see that he got one, (iii) the decision to get an attorney would mean that their dialogue was over, and (iv) Chambers would return shortly to get his answer.

Chambers returned thirty minutes later, at which time defendant stated that he did not want a lawyer and wished to continue speaking with Chambers. Up to that point, defendant had not made any incriminating statements regarding the murder. As the interview progressed, defendant asked Chambers whether it would be better for him to talk to a lawyer or to Chambers. Chambers asked defendant if he was seeking Chambers' personal opinion or his professional opinion. When defendant said that he wanted Chambers' personal opinion, Chambers told him that a judge and jury would weigh his fear of punishment against his remorse, and that it was Chambers' opinion that remorse should outweigh the fear of punishment. Defendant then confessed to the murder.

1. Defendant's Statements to Detective Chambers

Defendant's first argument is that the Chambers interview should have ceased upon his statement, "I think I would like to talk to a lawyer," because that statement was sufficiently clear to convey defendant's intent to invoke his Fifth and Sixth Amendment rights. We disagree.

Once a criminal suspect in custodial interrogation invokes his right to have counsel present, police must cease questioning until counsel is present or until the suspect validly waives his request. *Eastlack,* 180 Ariz. at 249-50, 883 P.2d at 1005-06 (citing *Edwards v. Arizona,* 451 U.S. 477 (1981)). The threshold question is whether

the defendant actually invoked his right. *Id.* at 250, 883 P.2d at 1006. The court in *Eastlack* concluded that a suspect's statement, "I think I better talk to a lawyer first," was sufficiently equivocal to permit the police officer to continue the interrogation. *Id.* at 251, 883 P.2d at 1007. The touchstone of the court's analysis was that the defendant's statement "was ambiguous, using the equivocal language 'I think' rather than the language of a clear request." *Id.*

When a suspect's request is unclear, police may continue their inquiry and pursue a confession, although it is considered "good police practice" to first clarify the suspect's intentions. *Id.* at 250, 883 P.2d at 1006 (citing *Davis v. United States,* 114 S. Ct. 2350, 2356 (1994)). Here, defendant's statement was qualified by the same phrase – "I think" – that our supreme court in *Eastlack* deemed sufficiently equivocal to render the statement ambiguous, which permitted further questioning. Similar to the actions taken by the police officer in *Eastlack,* Chambers ceased questioning on substantive matters until defendant clarified his intentions. Furthermore, the conditions of the interview do not appear to have been so oppressive or intimidating as to cause defendant "to speak in equivocal terms when no ambiguity or equivocation was meant." *Id.* at 251, 883 P.2d at 1006 (quoting *Davis,* 114 S. Ct. at 2361 n. 4 (Souter, J., concurring)).[3]

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[3] Although defendant emphasizes that he spent nearly twelve hours at the police station in a room that did not contain toilet facilities, and without being given a meal, we defer to the trial court's determination that defendant's will was not overborne under the circumstances. *See infra.*

Defendant, though, attempts to distinguish *Eastlack*. He notes that the police officer in *Eastlack* "immediately jumped into a clarifying dialogue whereby he questioned Mr. Eastlack concerning whether or not he really wanted an attorney." Here, Chambers also sought a clarification by ceasing questioning and telling defendant that he would return shortly, and would expect defendant to state unequivocally whether he wanted to speak with an attorney and thereby terminate the interview. In any event, such a distinction would not advance defendant's argument because, under *Davis* and *Eastlack,* there is no obligation to engage in a "clarifying dialogue." Accordingly, there was no violation of defendant's constitutional rights arising out of his first statement concerning legal counsel.

Defendant's second statement to Chambers is even less troubling than the first. Defendant asked Chambers whether he should continue talking with him or whether he should talk to an attorney. Defendant argues that the trial court erred by concluding that this statement was not a clear request for counsel. We, however, disagree because the statement was anything but unequivocal.

Defendant alternatively argues that the statement was "an equivocal request for counsel," even though, under *Davis*, when a request for counsel is equivocal, subsequent questioning is permitted. Notwithstanding, defendant invites us to adopt a more restrictive approach than that of *Davis*, arguing that our supreme court in *Eastlack* declined to expressly adopt *Davis*' majority decision. We, however, decline the invitation. First, if the supreme court had wanted to take a more restrictive approach, *Eastlack* provided the ideal opportunity to do so, but the court held that the officer could continue his interrogation despite the equivocal request for counsel.

Second, defendant's argument is unavailing in any event because his statement was not a request for counsel, equivocal or otherwise. Rather, the statement was merely a request for Chambers' advice. Neither *Miranda* nor *Edwards* requires police officers to encourage or advise suspects to invoke their Fifth and Sixth Amendment rights. There is no duty to advise a suspect beyond making him aware of his *Miranda* rights, because "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis,* 114 S. Ct. at 2356. Chambers thus fulfilled his duty without offending defendant's Fifth and Sixth Amendment rights.

2. The Custodial Setting in Which Defendant Confessed

Defendant also contends that the custodial setting in which police questioned him was so coercive as to overbear his will and exact an involuntary confession. Again, we disagree.

Inculpatory statements made during the course of custodial interrogation are admissible in evidence only if they are given voluntarily. *Arizona v. Fulminante,* 499 U.S. 279 (1991). "In determining the voluntariness of a confession, the trial court must look to the totality of the circumstances surrounding the confession and decide whether the will of the defendant has been overborne." *Lopez*, 174 Ariz. at 137, 847 P. 2d at 1084. Reviewing courts will not disturb a trial court's finding of voluntariness absent clear and manifest error. *Id.*

Defendant cites five factors in support of his argument:

1. The interview took place in a small room that lacked a drinking fountain and a toilet;

2. The interview lasted more than five hours;

3. Defendant never waived his *Miranda* warnings;

4. Detective Chambers' comments regarding remorse versus the fear of punishment were "an implied promise of a benefit;" and

5. Defendant's attempts to invoke his right to counsel were ignored and/or redirected in such a way to change his mind so he would instead rely upon some unstated, but implied, benefit that showing remorse would provide him.

We, however, are not persuaded.

The fact that the interview room was small and had no toilet or drinking fountain has little bearing on the voluntariness determination. Placing an arrestee in a cramped interview room is not necessarily coercive. *State v. Carillo,* 156 Ariz. 125, 133, 750 P.2d 883, 891 (1988) (suspect placed in "small, windowless interrogation room furnished solely with three chairs and a table"); *State v. Adams,* 145 Ariz. 566, 569, 703 P.2d 510, 513 (App. 1985) (arrestee questioned for one hour in five-by-seven foot room).

Involuntariness, however, is suggested when a defendant is unreasonably deprived of water or the use of toilet facilities. *Schneckloth v. Bustamonte,* 412 U.S. 218, 225-26 (1973) ; *Lord v. Duckworth,* 29 F. 3d 1216, 1222 (7th Cir. 1994); *cf. State v. Arnett,* 119 Ariz. 38, 43, 579 P.2d 542, 547 (1978) (defendant's "free will is not overborne where

there is evidence of nothing more than uncomfortable surroundings and slight health problems"); State *v. Knapp,* 114 Ariz. 531, 539, 562 P.2d 704, 712 (1977), *cert. denied,* 435 U.S. 908 (1978) (fact that defendant had a headache when he confessed was insufficient to render confession involuntary in absence of evidence that headache was so disabling as to render defendant unable to understand the meaning of his statements). The evidence here shows that police gave defendant a drink when he first arrived at the police station, and that he used a restroom before leaving for the burial site. More importantly, the record is devoid of evidence that defendant ever made any unheeded requests for either water or the use of a toilet.

Next, the duration of the interview is not compelling in this case. In his trial testimony, defendant stated that there were breaks during his interview with Detective Chambers. There is nothing to indicate that defendant was questioned for any extended period of time without a break. *See Martin v. Wainright,* 770 F.2d 918, 927 (11th Cir. 1985), *modified,* 781 F.2d 185 (1986), *cert. denied,* 479 U.S. 909 (1986) (five hour interrogation did not render confession involuntary where interview occurred during waking hours, defendant questioned off and on rather than continuously, fatigue did not appear to be a factor in decision to confess, and defendant did not explicitly refuse to answer questions). Moreover, even if defendant had been subjected to constant questioning for five and a half hours, it would not compel a finding that his confession was involuntary. *See United States v. Lehman,* 468 F.2d 93, 101 (7th Cir. 1972), *cert. denied,* 409 U.S. 967 (1972) (confession not involuntary where defendant questioned for nearly eight hours with only slight interruption)

Defendant's next contention, that he did not waive his *Miranda* rights, is not supported by the record. He was twice read the *Miranda* warnings and in both instances indicated that he understood his rights. He then proceeded to speak with police officers. An express waiver of *Miranda* rights is not necessary for a finding that a defendant's confession was voluntary. *North Carolina v. Butler,* 441 U.S. 369 (1979).

Last, we do not see any material distinction between defendant's fourth and fifth factors. We interpret them to mean that his confession was involuntary because he was promised something in return for confessing. Again, the facts belie his contention.

Defendant correctly asserts that a confession is not voluntary if it is induced by a direct or implied promise, however slight. *State v. Amaya-Ruiz,* 166 Ariz. 152, 165, 800 P.2d 1260, 1273 (1990), *cert. denied,* 500 U.S. 929 (1991). Nevertheless, a review of the applicable case law indicates that Detective Chambers' statements in response to defendant's request for advice do not rise to the level of a promise.

Chambers told, defendant that a judge and jury would weigh his fear of punishment against his remorse, and that it was Chambers' opinion that defendant's remorse should outweigh his fear of punishment. These statements were nothing more than Chambers' personal opinion. Defendant expressly asked for Chambers' personal opinion, and testified that he viewed Chambers' comments as "like his personal opinion of what he thought I should do." Even promises are not sufficient to render a confession involuntary when they are couched in terms of a personal opinion. *State v. McVay,* 127 Ariz. 18, 20, 617 P.2d 1134,

1136 (1980); *see also Amaya-Ruiz,* 166 Ariz. at 165, 800 P.2d at 1273 ("Mere advice from the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.

The instant case is readily distinguishable from *State v. Hall,* 120 Ariz. 454, 586 P.2d 1266 (1978), which defendant cites as "remarkably similar" on its facts. *Hall* involved a detective who, upon the defendant's denial of involvement in the crime, told him that his cooperation with the police "would be to his advantage come sentencing." *Id.* at 477, 586 P.2d at 1289. By contrast, Chambers expressed his opinion in response to defendant's direct request that he do so, and did not broach the subject of sentencing.

In summary, the typical indicia of coercion are absent in this record. There is no evidence that defendant was fatigued, thirsty, hungry, isolated for long periods of time, in physical pain, in fear, or intimidated or threatened in any manner. This case stands in stark contrast to those cases where confessions have been held to be involuntary under the totality of the circumstances. *See, e.g., State v. Tom*, 126 Ariz. 178, 180, 613 P.2d 842, 844 (App. 1980) (confession involuntary where defendant's hands cuffed behind his back, face covered with towel, and interrogated by officers who had threatened to kill him minutes earlier during defendant's violent arrest).

Accordingly, we conclude that the trial court did not err in ruling that defendant's post-arrest confession and other inculpatory statements were voluntary and admissible at trial.

B. The trial court properly considered evidence of defendant's prior theft conviction in ruling on the motion to suppress and at sentencing.

At the suppression hearing, defendant testified that he never "had any convictions of any kind" or any criminal record. Defendant also represented in his motion to suppress that his "familiarity with the criminal justice system and police procedure was quite remote. *His prior record was absolutely clean.*" (Emphasis added.) In fact, however, defendant had been charged with third degree burglary in 1989, pled guilty to theft, and received a suspended sentence and probation.

The state discovered the prior conviction and brought it to the trial court's attention after the suppression hearing, but before the trial court ruled on the motion. Four months later, defendant filed a supplemental reply in which he was silent regarding his prior conviction. The court then denied the motion to suppress, stating:

> Defendant lied under oath when he claimed to have never been previously convicted of a crime or of having a criminal record. *See* exhibit 3. Therefore, in resolving conflicts between Detective Chambers' version of his interrogation, and defendant's version of the interrogation, the court rejects defendant's position in each instance.

At sentencing, the trial court referred to the prior misdemeanor conviction as one among many aggravating factors. The court noted that it found the conviction to be an aggravating factor "because it's a theft conviction and it goes to honesty."

Defendant never challenged the evidence of his prior conviction. Moreover, he did not object to the trial court's consideration of his prior conviction for either the purpose of ruling on the suppression motion or at sentencing. This court therefore will not disturb the trial court's actions absent fundamental error. *State v. Gendron,* 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). Error is fundamental only if it (i) is clear, (ii) is egregious, (iii) is curable only via a new trial, (iv) reaches such dimensions that it cannot be said it is possible for a defendant to have had a fair trial, and (v) reaches the foundation of the case or takes from the defendant a right essential to his defense. *Id.* at 155, 812 P.2d at 628.

Defendant argues that the trial court's consideration of his prior conviction, based solely on the state's avowals and documentation, effectively deprived him of the right to be present at all critical phases of the prosecution. We disagree.

Defendant had notice of the state's contentions and an opportunity to rebut them. He did not file any reply to the state's supplemental response to his motion to suppress, did not seek reconsideration of the court's denial of his motion, and did not object at sentencing when the court stated that it was taking his prior conviction into consideration. These facts cannot be reconciled with defendant's position that he was not "present" for purposes of Rule 19.2 of the Arizona Rules of Criminal Procedure. Indeed, defendant was present at the suppression hearing and at sentencing. Neither his false statements at the suppression hearing nor his failure to respond to the state's allegations equates with a denial of the right to be present. Moreover, none of the cases defendant cites hold otherwise. Accordingly, there was no error.

CONCLUSION

We have searched the record for fundamental error pursuant to A.R.S. section 13-4035 and have found none. Defendant's convictions and sentences are affirmed.

/s/ Sheldon H. Weisberg
Sheldon H. Weisberg, Judge

CONCURRING:

/s/ Edward C. Voss
Edward C. Voss, Presiding Judge

/s/ Sarah D. Grant
Sarah D. Grant, Judge

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

April 17, 1992 HON. FRANK T. GALATI L. Carmickle
Deputy

No CR 91-04272 (Consol.)

STATE OF ARIZONA

v.

BILL RUSSELL CLARK

County Attorney
By: Jeffery Sandler

Greg Clark

Defendant's motion to suppress statements has been under advisement for some time. The court has now read the entire transcript of the proceedings of November 8, 1991 and the applicable case law, and has fully considered both, along with the memoranda and arguments of counsel. Based upon these things, the court finds as follows:

1. The determinative issue as to whether defendant's statement to police should be suppressed is whether defendant invoked his constitutional rights when he told Detective Chambers "I think I would like to talk to a lawyer" and whether the police honored his request by ceasing the interrogation.

2. Defendant was fully advised and properly advised of his *Miranda* rights and he fully understood them, despite defendant's testimony to the contrary.

3. Defendant lied under oath when he claimed to have never been previously convicted of a crime or of having a criminal record (RT, at 106). *See* exhibit 3. Therefore, in resolving conflicts between Detective Chambers' version of his interrogation, and defendant's version

of the interrogation, the court rejects defendant's position in each instance. Specifically, the court accepts as true Detective Chambers' version of the pertinent part of the interrogation as set forth at page 44, line 8 through page 51, line 5.

4. Defendant's statement "I think I would like to talk to a lawyer" is equivocal or ambiguous enough to allow the police to attempt to clarify whether defendant wished to cease the questioning or speak to an attorney. Mr. Clark's statement is as ambiguous as was defendant Staatz' statement, "Maybe I should be talking to a lawyer." See *State v. Staatz*, 159 Ariz. 411, 768 P.2d 143 (1988). Detective Chambers' response was

> "I told him if you – if he wanted a lawyer I would call him one. I told him I expected, if in fact he wanted a lawyer and I called him one, our dialogue would be over. I told him Margaret was there, I wanted to talk with her. That I was going to leave him alone for a few minutes to make a decision, and that when I returned to him I expected his answer." (RT 45, line 18-24).

This response is not interrogation, but rather is a permissible attempt to clarify defendant's statement. See *State v. Staatz*, 159 Ariz. 411, 413-415, 768 P.2d 143, 145-147 (1988); *State v. Lopez*, 96 Ariz. Adv. Rept. 13, 14-15 (App. 1991).

Upon returning to the interrogation room Detective Chambers said nothing to defendant. It was defendant who made the first statement, and it was that:

> "He did not want a lawyer, said that he did want to continue talking to me, and he added that it

was helping him deal better in talking to me." (RT, at 17, lines 11-13).

5. Detective Chambers then resumed his interrogation and defendant ultimately asked something "to the effect should I be telling you or should I talk to a lawyer?" (RT, at 49, lines 8-9). This question is clearly not an assertion by defendant of his right to counsel. *State v. Prince*, 160 Ariz. 268, 772 P.2d 1121 (1989) (defendant's statement "Do you think I should get a lawyer? . . . does not constitute an invocation of right to counsel." 160 Ariz. at 272, 772 P.2d at 1125).

6. For the foregoing reasons, defendant's motion to suppress on *Edwards* ground is denied.

7. The court further finds that the State has proven that the defendant was properly and fully advised of his constitutional rights, that he understood them, that he knowingly and voluntarily waived them and that his statements were willfully and voluntarily made.